CF

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

Enforcement
Case No. 15/850 SC/ENFC

BETWEEN: Republic of Vanuatu

Applicant/Defendant

AND: **1. Tony Alvos**
2. Denis Alvos

Respondents/Claimants

Date:	***Judgment 8th February, 2016***
Delivered:	***29th February, 2016***
Before:	***The Master Cybelle Cenac-Maragh***
In Attendance:	***Hardison Tabi for the Applicant/Defendant, Daniel Yahwa for the Responents/Claimants***
Present:	***Tony Alvos and Denis Alvos***

JUDGMENT

Introduction:

An application filed on the 23rd May, 2013 with Sworn Statement in support to set aside Default Judgment (regularly entered) granted on 6th May, 2013 by Chief Justice Lunabek came up for hearing on the 8th February, 2016.

Chronology of Events:

The Statement of Claim was filed on 11th of March, 2013 and served on the State Office three (3) days later on the 14th. A Response to the said Claim was filed approximately twenty-two (22) days later on the 4th April, 2013. On the 18th April 2013, claimants counsel filed a Request for the Default Judgment and the said Request was granted on the 6th May, 2013. The application before me now was filed on 23rd May, 2013 and an Enforcement Order was applied for on the 19th of September, 2013.

Jurisdiction to set aside Default Judgments

This is succinctly set out at Part 9.5 of the Civil Procedure Rules (CPR) as follows:

(1) A Defendant against whom judgment has been signed under this Part may apply to the Court to have the judgment set aside.

(2) The application:

a) may be made at any time and;
b) must set out the reasons why the defendant did not defend the claim; and
c) must give details of the defendant's defence to the claim; and
d) must have with it a sworn statement in support of the application; and
e) must be in Form 14.

(3) The court may set aside the default judgment if is satisfied that the defendant:

(a) has shown reasonable cause for not defending the claim;

b) has an arguable defence, either about his or her liability for the claim or

or about the amount of the claim.....

Submissions of Defendant:

Counsel for the defendant proffered his two grounds to justify the setting aside of the judgment:

1. That the delay in filing the defence was occasioned by the absence of the Officer, Mr. Frederick Kilu, on account of illness. A copy of his sick leave certificate was exhibited and marked CMM1.

   The leave certificate was made out for sick leave from the 9th of April, 2013 to the 23rd of April, 2013. He continued on to explain that immediately upon receiving the claim, instructions were sought from the client, but before Mr. Frederick could follow up he fell ill. The instructions were subsequently received on the 2nd of May, 2013 when a defence was drafted and was about to be filed when the defendant was served with the default judgment on the 8th May, 2013. A draft defence is exhibited to the sworn statement in support of application.

2. That the defendant has an arguable defence. Counsel for the defendant commenced by stating that there was a clear conflict of interest. That is, that the Second-Claimant, Denis Alvos is a co-owner, together with his brother Tony Alvos of MA Builders to whom the contracts were awarded, while he, Denis Alvos was the Operations Manager with the Public Works Departments (PWD). He went on to say that several contracts were entered into with MA Builders but had the company followed the proper tenders' procedure under the Government Contracts and Tenders Act Cap. 245 and the Public Finance and Economic Management Statutory Order Cap. 244 there would have been a more thorough screening and the possible conflict

could have been discovered. Counsel admitted, that regardless of the conflict there was some work undertaken by the claimants and some money was paid, though some remain unpaid due to the department having no record of completion certificates. These he said are provided by the PWD upon inspection. He indicated that to date he had no instructions as to the inspection of the remaining works.

The court asked Mr. Tabi to address it on the question of prejudice. He indicated that he had no instructions to address on this point.

Submissions of Claimants:

Counsel for the claimants referred the court to the sworn statement of Tony Alvos filed on the 10th December, 2015 to contradict the reason put forward by the defendant for its delay. Counsel for the claimants indicated that the delay was unreasonable in that it took the defendant fifty-three (53) days from service of the Claim to the receipt of the Default Judgment before he acted. He went on to indicate that while he does not dispute the illness of Mr. Kilu as this is proved; the certificate shows that he was returned to office with sufficient time to have taken some step. He goes on to point out that the State Office has numerous counsel who could have taken charge of the matter, and therefore, the absence of Mr. Kilu is an unsatisfactory excuse and the delay of fifty-three (53) days excessive.

On the question of the prima facie arguable defence, counsel submitted that the issue of conflict of interest does not hold for the following reasons:

1) That while there is a business license under the name of Tony and Denis Alvos, the business is run by Tony Alvos and not Denis Alvos. The fact that they are brothers is not an automatic indication of conflict.

2) The fact that the PWD's checks and balances did not take effect to discover the connection between the claimant and MA Builders, and, that the contracts were not put to the Tenders Board is not the fault of his clients. Further, it would have been the Director who would have approved such persons for contracts and not the Second-Defendant. He further submitted that the argument of the defendant that his client deliberately separated contracts into smaller ones so as to avoid the tendering process is false as the sworn statement of Tony Alvos of 19th March, 2013 asserts. That is, it is a normal practice to separate contracts for the hiring of equipment which is primarily what these contracts were for: Exhibit TA14 refers, showing the hiring of two back hoe's and an excavator.

Counsel addressed the court on prejudice, stating that prejudice would be suffered by his client and that they in fact were already suffering prejudice due to delay as a result of:

1) the lengthy settlement discussions by correspondence and meetings from 2013 to 2016; and

2) the court's delay in listing the matter.

And finally, consequent to the obtaining of the contracts, loan arrangements were entered into for the purchase of equipment for the business with interests continuing to accumulate as long as the contracts remain unpaid.

****

Delay

Aside from the test set out at Part 9.5 the case of Fiji National Provident Fund v. Shri-Datt[1] establishes the test to be:

1) **whether the defendant has a substantial ground of defence to the action;**
2) **whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and**
3) **whether the claimant will suffer irreparable harm if the judgment is set aside.**

The defendant's first course of action is to prove that he has a triable issue[2] otherwise he will fail at first instance and will be unable to proceed further. The defendant must then be able to show that the delay was trivial and there were good reasons for it, and finally, the defendant should be able to demonstrate that the decision in his favor to set aside would not prejudice the claimant in a way that could not be compensated in costs.[3]

I will firstly consider number 2), the lesser of the three limb test.

While the lack of a reasonable explanation may not necessarily be fatal to the decision to disturb a default judgement it is nevertheless given due consideration, particularly in light of the real possibility of prejudice to the claimant.[4]

The defendant asserts that the primary cause of the delay was due to the ill-health of counsel with conduct for the matter and that instructions were immediately sought after service, with the subsequent delay thereafter due to his client's delayed instructions. I note that it took the defendant twenty-two (22) days to file a Response and it was twenty-seven (27) days from the date of receipt of the claim that defendant counsel took ill. The defendant therefore had more than enough time, nearly a full month, to not only raise a defence but to either write to the claimants counsel requesting additional time or else file an application for an extension of time, putting forward the

[1] [1988] SPLR 138
[2] Fiji Sugar co-Operation v. Mohammed Ishmail [1988] 34 FLR 81
[3] JH Maktilow PTY Limited v. Alloway Gracing PTY Limited [1975] 1 NSWLR 385
[4] Cohen v. Mark William [1995] 39 NSWLR 476 at 481

delay on the part of his client. The court, I am sure, would have, at that stage, granted the extension.

Further, the defendant is represented by the State office, which counsel for the claimants inform has more than one lawyer on staff. In fact, he used the word 'numerous', which is undisputed by defendant counsel. With 'numerous' lawyers there were obviously more than enough attorneys to whom Mr. Kilu's file could have been assigned for follow-up and action. The situation might have been different had the defendant been represented by a sole practitioner in Chambers.

I find it incredible that the State office, which should set the bar regarding quality of work and compliance with rules and orders should proffer such a listless excuse for non-compliance with the timeline for filing a defence. The State, more than any other litigant, being vastly more resourced and able than individual litigants should, as much as possible, limit their delay in matters with citizens who are unable to boast of similar or comparable resources. It is exceedingly unjust for the State to be the cause of delay and possible prejudice to parties with whom they are engaged with in litigation.

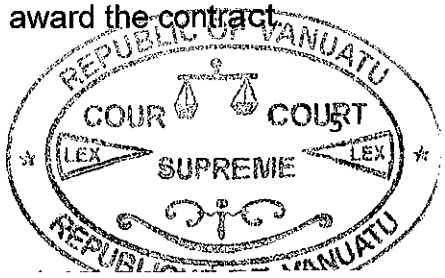
Notwithstanding, I do not see that this delay has caused any real prejudice to the claimant that cannot be compensated by costs. Should the application be set aside and the matter reach trial and the claimants prove successful, then the defendant would be responsible for meeting all damages and costs incurred as a result of their breach.

Therefore, while the reason for delay of the defendant is unacceptable to the court it is not fatal to the application, particularly when no real prejudice can be demonstrated.

Arguable Defence

During defendant counsel's presentation to the court, I had to take pause on a couple of occasions to seek clarification on issues in his defence, more particularly on the matter of the conflict of interest. I did indicate to counsel that his defence was ambiguous and confusing as to the exact defence that was pleaded. To further confuse an already confused defence he went on to admit, that regardless of the conflict the defendants were never precluded from applying to be considered for the contractual works with the PWD. While the Government Contracts & Tenders Act was referenced to suggest breach of its terms the court was referred to no particular section to prove such breach.

Counsel offered no reply to the First-Defendant's assertions in his sworn statement of the 19th September, 2013 that he was not the Operations Manager but the Principal Engineer and that even if he was appointed to the said post it would have offered no assistance to his brother as it is the Director-General who would have had full authority to award the contract.



In his sworn statement of the 19th September, 2013 Denis Alvos states, at paragraph 6, that it was the Director who advised him that, *"machinery contracts were not work contracts and therefore could not be lumped together"* and treated as such.

In spite of the ambiguity and sparseness of the defence which, by its mere drafting revealed a defence that carried no degree of conviction, I did, by my own effort, delve into the generally referenced Government Contracts and Tenders Act to determine whether this gave rise to a viable defence.

To ascertain whether the defendant could in fact show an arguable defence I looked at the following:

1) Did the work provided by the claimant fall to be considered as government **work** contracts?
2) Did the contracts, in toto exceed VT5 million?
3) Were the contract works the same or substantially the same subject-matter?
4) Were the contracts split to avoid the tendering process?

1. **Did the work provided by the claimant fall to be considered as government work contracts? [S2A(1)(a)]**

   Section 2A(1)(a) of the Government Contracts and Tenders Act defines a government contract, as *"a contract or arrangement for the supply of goods and services or the execution of public works in consideration of payments out of public monies."*

   It can be said from the sworn statement of the First-Claimant that he was supplying goods by way of equipment for hire to the government for which he was paid out of public funds and therefore did engage in a government **work** contract.

2. **Did the contracts, in toto exceed VT5 million? [S.9 of Act & S.9 of Amended Act]**

   A perusal of the sworn statement of the 19th September, 2013 of the First-Defendant exhibiting TA1-TA8 and T15 and T17 show contracts awarded in the amount of VT38,243,525 which clearly exceeds the VT5 million bench mark after which contracts are to be tendered.

3. **Were the contract works the same or substantially the same subject- matter? [S.33 of the Amended Act]**

   A review of the contracts reveal that there appears to be the same or substantially the same subject-matter under consideration of each contract as the contracts exhibited were all for the hire of equipment.

4. **Were the contracts split to avoid the tendering process? [S.33 of the Amended Act]**

   As to the reason why it appears that these contracts were treated as separate cannot be commented on by this court as this remains a matter to be determined on the full evidence of the parties. It would nevertheless appear, on the face of it, that there was a separation of these works, taking into account that the contracts, taken together exceeded VT5 million and were substantially the same subject-matter.

Notwithstanding, the defendant would have to address the claimants claim that they were misled by the Director in not presenting the contracts together, thereby causing the First-Claimant to act to his detriment. The defendant would also have to have regard to Section 33 of the Amended Government Contracts and Tenders Act No. 40 of 2013.

I do find it incredulous though that three contracts were awarded to the First-Claimant on the 28th January, 2011 amounting to VT14, 055,750 and at no time was the Director or other authority alerted to these contracts being in excess of VT5 million.

Further, another four contracts were awarded on the 1st March, 2011 amounting to VT18, 998, 750 and yet again this raised no concern under the Act so that the necessary and correct process could be employed. I will say no more on the inference that could be drawn.

While the defendant has been unable to establish any arguable defence regarding a conflict of interest between MA Builders and the Second-Defendant, and being unable to show how that conflict would affect the nature of the contract, I can nevertheless see, based on the Act and its amendment that the defendant has a defence that carries with it some degree of conviction, this being the primary hurdle over which he was to leap. But for the court's own effort he almost failed.

Conclusion

In considering all limbs in the test to set aside this Default Judgment, I am of the considered opinion that the interests of justice dictates that this judgment be set aside. Though I cannot accept the excuse offered for the delay as I consider it weak and without merit, I nonetheless find that there is a serious claim and a sufficient defence, albeit inadequately pleaded, to cause the court to act in favour of the defendant.

Costs

Counsel were asked to address on costs. Claimant counsel requested VT400,000 while defendant counsel requested VT50,000. Defendant counsel

objected and suggested an award of costs to the claimant of no more than VT50,000. Counsel for the claimant had no objection to costs put forward by Mr. Tabi.

It is well established that costs are almost always awarded to the claimant in these types of applications in spite of the favourable outcome to the defendant as it is due to the inaction of the defendant why the application would be before the court.

Costs are therefore awarded to the claimants. I have taken into account the sworn statement put in by the claimants in response to this application and the effort expended by counsel in opposition. I therefore award VT60, 000 to the claimants to be paid in the terms set out below.

My order is as follows:

1. The default judgment of the 6th May, 2013 is hereby set aside.

2. The defendant is to file his defence within seven (7) days of the delivery of this judgment. **Failure to file and serve within this time will result in judgment being entered for the claimants.**

3. The defendant is to pay costs to the claimants in the amount of VT60, 000 within twenty-one (21) days of delivery of judgment. **Failure to pay will result in the defence being struck off and judgment entered for the claimants.**

4. This matter is scheduled for review on the 3rd March, 2016 at 8:45 a.m. to allow the defendant time to obtain instructions on whether he wishes to proceed to mediation or trial.

DATED at Port Vila, this 29th day of February, 2016.

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU

BY THE COURT

.....

CYBELLE CENAC-MARAGH

MASTER