

**PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]**

WS NO. 560 OF 2010

BETWEEN:

TZEN PACIFIC LIMITED

Plaintiff

AND:

PETER PUANA, CLEMENT PAELA, FIDELIS RUTE, VINCENT LINGE, MICHAEL LAGO, BONIFACE MONDO & MOSES KAPU *in their capacity as Directors of Aria Vanu*

*Timber Company Limited
First Defendants*

AND:

ARIA VANU TIMBER COMPANY LIMITED

Second Defendant

Waigani: Kawi J

2010: 20 December

2011: 8 March

PRACTICE AND PROCEDURE – Notice of Motion – Application for default judgment – Application made after five months after occasions for default arose – Substantive reliefs cannot be sought in interlocutory proceedings – It is a good practice to conduct and then file an affidavit of search a day before moving the application for default judgment – The affidavit of Search must specify the specific document being searched for – Good practice to forewarn the other party of their default when the pleadings are still running and have not expired as yet – Purpose of forewarning defeated when a letter forewarning the other party is given after the default has occurred- Motion for default judgement refused.

Facts

The plaintiff applied for default judgment against the defendants after the defendants failed to file their defences within the time limited to file their defences. The plaintiffs applied for default judgment some five (5) months after the occasion for default arose with the letter of forewarning given to the defendants five (5) months later. In refusing the application for default judgment:

Held:

(1) The power to determine liability with the entry of default judgment is a permissive and discretionary procedure. The power of the court to enter default judgment is granted by Order 12, rule 25 of the *National Court Rules*.

(2) The affidavit of Search must depose to a very recent search to confirm the default. It is a good practice to conduct the file search at least a day before moving the application for default judgment.

(3) The letter forewarning the other party of their default must be given to the other party while the time limited for filing defences is still running or is about to expire. A letter of forewarning given after the occasion for default arose defeats the purpose of forewarning the defaulting party.

(4) The application for default judgment must be made promptly after the occasion for default arose. Applying for default judgment some five (5) months after the occasion for default arose defeats the purpose of forewarning the party defaulting and the entire rationale behind determining liability by entry of default judgment.

(5) A letter forewarning the other party of their default must be given when the time limited to file the defence has not expired and is still running or is just about to expire. This serves two purposes;

(a) It will truly forewarn the defendants of their upcoming default; and

(b) It will enable the party defaulting to take steps to rectify the situation by either applying for an extension of time to file a defence whilst the pleadings are still running. An application for extension of time to file defence can only be made when the time for filing defence has not expired as yet. It cannot be filed after the time limited to file a defence has expired.

Case cited:

Mapmakers Pty Ltd –v- Broken Hill Proprietary Company Ltd [1987] PNGLR 78

Counsels:

Mr F Griffin, for the Plaintiff

Mr R Habuka, for the Defendants

8 March, 2011

1. **KAWI, J:** By a Notice of Motion filed on the 7th December 2010, the plaintiff moved the court for the following reliefs:

(1) Pursuant to order 12 rules 31 and 32 of the National Court Rules, default judgment be entered

against the defendants.

(2) Default judgment be entered against the defendants for a declaration that the defendants' letter to the plaintiff dated 20th April 2010 was issued in breach of clauses 23.1(A)(ii), 32.3 and 32.4 of the Logging and Marketing Agreement between second defendant and Cakara Alam (PNG) Limited dated 6th June 2003.

(3) Default judgment be entered against the defendants for an order in the nature of a permanent injunction restraining the defendants, their employees agents, servants or whosoever otherwise from purporting to give effect and enforce the defendants' letters to the plaintiff dated 20th April 2010 and 14th May 2010 respectively.

(4) Default judgment be entered against the defendants for an order in the nature of a permanent injunction restraining forthwith the defendants, their agents or whosoever otherwise from threatening, disturbing, interfering and preventing the plaintiff from conducting its logging operations within the Aria Vanu Block 3 Project in West New Britain. Such logging operations are conducted pursuant to the Logging and Marketing Agreement between the second defendant and Cakara Alam (PNG) Limited dated 6th June 2003.

(5) Costs.

(6) Any other orders the court sees fit.

Facts

2. The facts as I find them are that the plaintiff commenced this proceeding by way of a writ of summons against the defendants on the 18th of May 2010. The second defendant is a landowner based company. The first defendants are the directors of the second defendant. The second defendant is the holder of a Timber Permit No. TP14-13 issued to it by the Minister for Forests for the Project area known as Aria Vanu Block 13 Local Forest Area.

3. On or about the 6th June 2003, the second defendant and a developer Cakara Alam (PNG) Limited entered into and signed the Logging and Marketing Agreement to develop the forest area located in the Aria Vanu Block 13 Local Forest Area. Cakara Alam (PNG) Limited subsequently assigned its rights and obligations under the Logging and Marketing Agreement (LMA) to Tzen Niugini Limited.

4. On the 17th September 2009, Tzen Niugini Limited again assigned its rights and obligations under the LMA to Tzen Pacific Limited, the plaintiffs in these proceedings.

5. On the 9th May 2010, the plaintiff received a letter from the defendants dated 20th April 2010 in which the defendants purported to terminate the Logging and Marketing Agreement. The plaintiff disputed the termination letter and advised the defendants in a letter dated 12th May 2010 to refer this dispute to an arbitration hearing to resolve this dispute, pursuant to clause 23.1(a)(ii) of the LMA.

6. By a letter dated 14th May 2010, the defendants advised the plaintiff that they had terminated the LMA.

7. The plaintiff then commenced this action while it seeks certain substantive declaratory orders. These substantive reliefs they seek include:

(a) A declaration that the defendants' letter to the plaintiff dated 20th April 2010 was issued in breach of clauses 23.1(A)(ii), and 32.4 of the Logging and Marketing Agreement between the second defendant and Cakara Alam (PNG) Limited dated 6th June 2003.

(b) An order in the nature of a permanent injunction restraining the defendants, their employees, agents, servants or whosoever otherwise from purporting to give effect and enforce the terms of the defendants' letters to the plaintiff dated 20th April 2010 and 14th May 2010, respectively.

(c) An order in the nature of a permanent injunction restraining forthwith the defendants, their agents, servants or whosoever otherwise from threatening the plaintiff from conducting its logging operation within the Aria Vanu Block 3 Project in West New Britain [conducted pursuant to the Logging and Marketing Agreement between the second defendant and Cakara Alam (PNG) Limited dated 6th June 2003].

8. The writ of summons and the statement of claim was served on the defendants on the 24th May 2010. On the 31st May 2010, the defendants filed their Notice of Intention to Defend. They however, have not filed their defence to the allegations raised in the statement of claim. The time limited to file their defence lapsed on or about the 7th July 2010. A file search conducted by the plaintiff at the National Court Registry here in Waigani on the 23rd November 2010 revealed that the defendants still defaulted in filing their defences some five (5) months after it became due.

9. By a letter dated 23rd November 2010, the plaintiff forewarned the defendants of their default in filing a defence within the required time and also advised them of their intention to apply for default judgment.

The Law

10. The plaintiff's application for default judgment is made pursuant to Order 12 Rules 31 and 32 of the National Court Rules. Rules 31 and 32 are stated in these terms:

Rule 31 – Mixed claims (17/8)

where the plaintiff's claim for relief against a defendant in default includes two or more of the claims for relief mentioned in Rules 27 to 30 inclusive of this order, and no other claim, the plaintiff may enter such judgment against that defendant on any of those claims for reliefs as he would be entitled to enter under those Rules as if that were the

plaintiff's only claim for relief against that defendant.

32 – General (17/9)

(1) whatever claims for relief are made by a plaintiff, where a defendant is in default, the court may, on application by the plaintiff, direct entry of such judgment against that defendant as the plaintiff appears to be entitled to on his writ of summons.

(2) Notwithstanding sub-rule (1) of this Rule, the court shall not, under that sub-rule, direct the entry of judgment for possessions of land unless satisfied of the matters mentioned in sub rules (2) and (4) of Rule 30 of this order.

11. Order 12 rule 25 outlines the circumstances in which the defendant can be in default. And a defendant can be in default "where he is required to file a defence and the time for him to file this defence has expired, but he has not filed his defence."

12. In my view order 12, rule 31 would apply if the plaintiff's claim for relief against the defendants who are in default includes two or more of the claims for relief mentioned from Rules 27 to 30.

13. Rule 27 is concerned with an unliquidated demand while Rule 28 deals with liquidated claims. Rule 29 deals with the torts of detinue and Rule 30 deals with a claim for possession of land.

14. In my view Rule 31 has no application to the plaintiffs claim here. Rule 31 would apply if the plaintiff claims as pleaded in the statement of claim relates to one of the tortuous matters pleaded in Rules 27 to 30.

15. Rule 32 is a general enabling power which empowers the court to enter judgment for the plaintiff whenever it is proven that a defendant is in default. Here the plaintiff submitted that the defendant is in default because they have not filed their defences as required by the Rules and the time for filing the defence has lapsed on the 7th July 2010.

16. This brings into play Order 12, Rules 25 and 32. These rules empower the court to enter default judgment in these circumstances.

17. And clearly the defendants are in default here of filing their defence before the 7th July 2010. Do I enter default judgment here? Default judgment is a permissive and discretionary process.

18. The plaintiffs submit that they have complied with all the procedural requirements before applying for default judgment. These included:

(a) Conducting a fresh file search at the National Court Registry to determine whether a defence has indeed been filed as required by the Rules. Here the plaintiff deposes that a file search was conducted at the National Court Registry here in Waigani on the 23rd

November 2010. The search confirmed that no defence had been filed as yet despite filing of their Notice of Intention to Defend.

(b) On the same day (ie 23/11/2010) the plaintiff sent a letter forewarning the defendants of their default and further advising them of their intention to apply for default judgment.

(c) The plaintiff also referred to the practice of forewarning the defendant of their intention to apply for default judgment as laid down by the then Chief Justice Sir Buri Kidu in the case of *Mapmakers Pty Ltd –v- Broken Hill Proprietary Company Ltd* [1987] PNGLR 78 and Practice Direction NCR 1/87 which was issued on the 5th June 1987, to give effect to that judgment.

19. Neither the National Court Rules nor Practice Direction 1/87 prescribes a time limit or time line within which the forewarning letter must be given to the other party. Be that as it may, in my view, it is a good practice to forewarn the defendants of their default, when the time limited to file their defence is still running and has not expired as yet. Such practice gives the defendant two options;

(a) To immediately take steps to try and file a defence before the time limited to file the defence expires; and

(b) Provided the defendant has good reasons, to file an application to extend the time limited to file defence whilst the time limited to file a statement of defence is still running. An application for extension of time cannot be filed after the time limited to file a defence has expired. This is the rationale in the *Mapmakers case*. And this is reason for forewarning the other party.

20. In my view it is also a good practice to file an affidavit of search deposing to a very recent search conducted at the Civil Registry in Waigani to confirm the default. This affidavit of search can then be relied upon in moving the application for default judgment. This file search must be conducted and an affidavit of search filed at least a day before moving the application the following day.

21. Here the plaintiff relies on an affidavit deposed to by a Mr Pala Wagula who states that he conducted a personal file search of the court file WS 560 of 2010. Mr Wagula does not say what documents he searched for. All he deposes to is that he obtained a copy of the front cover of the unit file Index and the court endorsements on file. Again the affidavit of search must clearly specify the documents searched for. Mr Wagula simply failed to specify the documents he was searching for. He then delivered a letter dated 23rd November 2010 to the defendants' lawyer forewarning them of the plaintiff's intention to apply for default judgment.

22. In my view it is also a good practice to conduct and then file an affidavit of search as well as give the letter forewarning the defendants of their default at the very least within a week of the occasion for default arising.

23. Apart from serving as a warning letter, this will also give the defendants an opportunity to apply for an extension of time to file a defence out of time, if need be, whilst the time for the pleadings have not expired as yet.

24. Here the time required to file a defence lapsed on or about the 7th July 2010. The plaintiff should have conducted the affidavit of search and given the forewarning letter to the defendants at least a week, before the occasion for default arose on Wednesday 7th July 2010.

25. A reasonable time period in which the plaintiff could have given notice forewarning the defendants should have been around Tuesday 29th or Wednesday the 30th June 2010. Then the Affidavit of Search should have been conducted on Monday 5th or Tuesday 6th July 2010.

26. Here the plaintiff did not do anything when the occasion for default first arose on the 7th July 2010 until November 2010, some five months later. Applying for default judgment some five (5) months after the default arose defeats the purpose of sending out forewarning letters to the other party.

27. A determination of liability by entry of default judgment is a rather draconian procedure which arises because the other party has not shown any active interests in the proceedings. However, it presupposes that everything has been properly done, up to this stage including the affidavit of search and the letter of notice forewarning the defendants.

28. Furthermore, a default procedure is permissive only and is discretionary. It short cuts the need to conduct a trial proper. Because of this the party seeking default judgment must ensure that he complies with every procedure required before liability can be determined with the entry of default judgment.

29. In the case before me, I am asked to give judgment determining liability by the default procedure and so I must assume that the plaintiff has proceeded strictly in accordance with the Rules and the Law. I have already alluded to these earlier in these discussions of what I consider to be good practices which should be adopted and followed by practitioners. Failure in my view to follow these good rules of practice would in my view, result in the judge exercising his discretion not to enter default judgment.

30. In the present case, a letter of forewarning was given on the 23rd November 2010, five months after the occasion for default arose.

31. In my view, to give a letter of warning this late also defeats the entire purpose of giving a letter forewarning the other party.

32. A letter of forewarning serves its purpose only if given before the default actually arises and not some five months later.

33. Taking all these accounts into consideration, I would exercise my discretion to refuse the award of default judgment.

34. There is a further reason why I will refuse the application for default judgment. And this relates to the reliefs sought. The relief sought in the Notice of Motion are the same reliefs being substantially sought in the statement of claim. Substantive reliefs sought in the statement of claim cannot be sought in interlocutory proceedings as interlocutory reliefs. The reliefs sought in Order 2, 3 and 4 of the Notice of Motion are essentially the same as those sought in the statement of claim especially at paragraphs 15A, B, C and D.

35. In my view it is not proper to grant substantive reliefs to a party in an interlocutory proceeding. It would appear that the plaintiffs are asking for substantive reliefs in how the request for relief is worded, for instance reliefs 2, 3 and 4 in the Notice of Motion state that:

"Default judgment be entered against the Defendants for a declaration that or for an order that"

36. In my view the plaintiff is quite confused about seeking interlocutory reliefs and seeking substantive reliefs. This is more so in his wording of the reliefs he is seeking. Here the reliefs sought in the Notice of Motions, especially, in paragraph 2, 3 and 4 are the same substantive reliefs sought in the statement of claim. I will not grant the substantive declarations sought in the Notice of Motion especially those sought in paragraphs 2, 3 and 4.

37. Defence counsel deposed to an affidavit outlining reasons as to why the defendants cannot be readily available to give instructions to file their defence.

38. Defence counsels deposes that his clients live in a very remote area of West New Britain, where transport services and effective communication is very difficult indeed.

39. I accept these reasons as being very genuine and the difficulties faced by the defendants in communicating with their lawyer and conveying to him their response to the allegations contained in the statement of claim.

40. In the circumstances I will refuse the application for default judgment to be entered against the defendants for their default in filing their defence within the time required. I will also order that the defendants be given 21 days as from the date of this judgment to file their defence out of time. The formal orders of this court are as follows:

(1) Application for default judgment is hereby refused.

(2) As the time to file a defence has already lapsed on the 7th July 2010, I will in the exercise of my discretion, order the defendants to file their defences within 21 days as from the date of this judgment.

(3) All and any further interlocutory proceedings including the motion for contempt and any other proceedings arising from this Ruling or any other matter connected with or arising in anyway out of this action is hereby stayed and the matter is now referred for

mediation of the dispute relating to the alleged termination of the Logging and Marketing Agreement entered into between the second defendant and Cakara Alam (PNG) Limited as subsequently assigned, on 6th June 2003.

(4) This referral for mediation is made pursuant to Rules 4 and 5 of the ADR Rules. This does not affect the defendants' right to have their defence filed within 21 days of this Order.

(5) These entire proceedings are now ordered to be transferred to the National Court in Kimbe where the mediation will also take place.

(6) Costs of the application including receiving the judgment is awarded to the defendants. The costs will be paid on a party/party basis. They will be taxed in accordance with the National Court costs schedule if not agreed upon.

Young and Williams: *Lawyer for the Plaintiff*
Daniels Lawyers: *Lawyer for the Defendants*