

SC1514

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA No. 155 of 2013

WAWOI GUA VI TIMBER COMPANY LIMITED

First Appellant

AND

THONG JUK CHUONG

Second Appellant

AND

WONG KEH YEE

Third Appellant

AND

GERO BILLY & ORS

Fourth Appellant

AND

SERGEANT JERRY BIAMAGA

Fifth Appellant

CONSTABLE FRANK JOHE

Sixth Appellant

AND

JOHN MOLU

Respondent

Waigani: Makail, Sawong and Neill JJ
2016: 30 June and 21 July

SUPREME COURT – Appeal against setting aside of ex parte order – Order dismissing proceedings for want of prosecution – Setting aside of order – Jurisdiction of – National Court Rules – Order 12, rule 8 (3)

SUPREME COURT – Appeal against setting aside of ex parte order – Order dismissing proceedings for want of prosecution – Merits of appeal – National Court Rules – Order 12, rule 8 (3)

Legislation and other material cited

National Court Rules (Rules) Order 12 Rules 8(3)

Cases cited

Donigi v. Base Resources Ltd [1992] PNGLR 110

Green & Co. v. Green [1976] PNGLR 73

Morobe Provincial Government v. Tropical Charters Ltd [2009] N4160

Malt v. Queen & Anor [2009] N3577

NCDC v. PNG Water Ltd & Ors [1999] SC624

Robert Kittika v. Raga Kavana & Ors [2010] N4051

Rangip v. Loko [2009] N3714

Smith v. Ruma Constructions [2002] SC695

Thomas Babia v. Pepi Kimas & Ors [2009] N3940

Overseas authorities

Annetts v. McCann (1990) 170 CLR 596

As New Printing Machinery Co Pty Ltd v. Hymans Asset Management Pty Ltd [2009] NSWSC 222

Cameron v. Cole [1943-1944] 68 CLR 571

Greig & Anor v. Australian Building Industries Pty Ltd [2002] QSC 138

Nicholson v. Nicholson [1974] 2 NSWLR 59

Ritchie Uniform Civil Procedure (NSW)

Counsel:

J A Griffin QC with *A Mana*, for First, Second and Third Appellants

No appearance for Fourth, Fifth and Sixth Appellants

J Apo, for the Respondent

JUDGMENT

21 July, 2016

1. **MAKAIL, J:** The circumstances giving rise to this appeal are ably set out by Sawong & Neill JJ in their decision and I respectfully adopt them. I wish to make a few comments and observations in addition to what their Honours have stated in relation to the jurisdictional argument advanced by the First, Second and Third appellants to have this Court aside the decision of the National Court.

2. The National Court set aside an ex parte order dismissing proceedings for want of prosecution. The decision was based on Order 12, rule 8 of the *National Court Rules*. This rule states:

“8. *Setting aside or varying judgement or order. (40/9)*

(1) *The Court may, on terms, set aside or vary a direction for entry of judgement where notice of motion for the setting aside or variation is filed before entry of the judgement.*

(2) *The Court may, on terms, set aside or vary a judgement —*

(a) *where the judgement has been entered pursuant to Order 12 Division 3 (default judgement); or*

(b) *where the judgement has been entered pursuant to a direction given in the absence of a party, whether or not the absent party had notice of trial or of any motion for the direction; or*

(c) *when the judgement has been entered in proceedings for possession of land pursuant to a direction given in the absence of a person and the Court decides to make an order that the person be added as a defendant.*

(3) *The Court may, on terms, set aside or vary an order —*

(a) *where the order has been made in the absence of a party, whether or not the absent party is in default of giving a notice of intention to defend or otherwise in default, and whether or not the absent party had notice of motion for the order; or*

(b) *where notice of motion for the setting aside or variation is filed before entry of the order.*

(4) *In addition to its powers under Sub-rules (1), (2) and (3), the Court may, on terms, set aside or vary any order (whether or not part of a judgement) except so far as the order determines any claim for relief or determines any question (whether of fact or law or both) arising on any claim for relief and excepting an order for dismissal of proceedings*

or for dismissal of proceedings so far as concerns the whole or any part of any claim for relief.

(5) This Rule does not affect any other power of the Court to set aside or vary a judgement or order.”

3. The case of *Malt v. Queen* [2009] N3577 was relied upon to advance the jurisdictional argument, that the primary judge lacked jurisdiction to set aside the ex parte dismissal order. It should be observed that, that was a case which involved an application to set aside an ex parte order dismissing proceedings for want of prosecution. The application was brought under Order 12, rule 8. The Court concluded that Order 12, rule 8 did not confer jurisdiction on the National Court to set aside an ex parte order dismissing proceedings for want of prosecution. One of the reasons it gave was that the dismissal order terminated the proceedings and no proceedings exist upon which a further application can be made to set aside the dismissal order.

4. This reasoning was followed in a few National Court cases such as *Thomas Babia v. Pepi Kimas & Ors* [2009] N3940 (Kandakasi J) and *Robert Kittika v. Raga Kavana & Ors* [2010] N4051 (Makail J).

5. Other National Court cases held a contrary view, holding that Order 12, rule 8 does confer jurisdiction on the National Court to set aside an ex parte order dismissing proceedings for want of prosecution. Examples of these cases are *Rangip v. Loko* [2009] N3714 (Hartshorn J) and *Morobe Provincial Government v. Tropical Charters Ltd* [2009] N4160 (Gabi J).

6. This view is based on one of the exception to the general rule that a Court has no power to set aside a final order once it has been passed and entered. The exception is where the judgment or order has been made ex parte. In this case where the dismissal order was made ex parte, it may be set aside.

7. *Malt v. Queen* was a case I decided. In my view, theoretically, the reasoning that the proceeding once dismissed does not exist cannot be said to be flawed nor can it be argued as being untenable. There is merit in this reasoning. But it may not stand the practical test.

8. A plaintiff who, for one reason or another, fails to prosecute a claim and it is dismissed for want of prosecution in the plaintiff's absence may be confronted with the practical difficulties of appealing the dismissal order. There are many scenarios but a few need mentioning.

9. First, given that the order was made in its absence the Court would have proceeded without hearing the plaintiff. The plaintiff may have had an explanation for the default or inaction but because the claim was dismissed in its absence, the explanation is not drawn to the notice of the Court. As an appeal to the Supreme Court is a rehearing and will be confined to matters placed in the National Court, the explanation will not be considered unless it is

allowed with leave of the Supreme Court as fresh evidence under section 6 (1) (a) of the *Supreme Court Act*. In my view, this is one practical difficulty a plaintiff may face if an appeal is the only option open to it. It is an undesired result in terms of time and costs.

10. The other is the ready access to the Supreme Court by an aggrieved plaintiff, a point which my Brothers have succinctly explained at paragraphs 67 to 69 of their decision which need no further expounding save to say that returning to the National Court may prove economical and time-saving for both parties - that it will be an opportunity for the plaintiff to have the Court hear and decide, amongst other things, its explanation for the default or inactivity.

11. These and many other practical considerations not mentioned lean further support to the argument that Order 12, Rule 8 confers jurisdiction on the National Court to set aside an ex parte order dismissing proceedings for want of prosecution.

12. Another way of resolving the jurisdictional issue and the differing views by the National Court is to look to similar jurisdictions as ours and see if there is an equivalent or similar provision (rule) in their Court Rules and better still decided cases on point to determine this issue. My Brothers have referred to *Ritchie Uniform Civil Procedure (NSW) NSW Supreme Court Practice* Part 40, rule 9(3) and *Nicholson v. Nicholson* [1974] 2 NSWLR 59 in their decision.

13. The jurisdiction argument was considered in *As New Printing Machinery Co Pty Ltd v. Hymans Asset Management Pty Ltd* [2009] NSWSC 222, a decision of Hulme J delivered on 31st March 2009. That case involved a question as to whether there should be a setting aside of an order which set aside an order. The judgment in question was the dismissal of an application to set aside an order re-instating a statement of claim that had earlier been dismissed for inactivity (want of prosecution) pursuant to rule 12.9 of the *Uniform Civil Procedure Rules (NSW)*.

14. The primary argument advanced by counsel for the defendant was that there was no statutory power under rule 36.16 to set aside an order for dismissal made pursuant to rule 12.9. Rule 36.16(3) which is equivalent to our Order 8, rule 8 (4) (supra) is in these terms:

“(3) In addition to its powers under sub rules (1) and (2), the court may set aside or vary any judgment or order except so far as it:

(a) determines any claim for relief, or determines any question (whether of fact or law or both) arising on any claim for relief, or

(b) dismisses proceedings, or dismisses proceedings so far as concerns the whole or any part of any claim for relief.”

15. It was argued, *inter alia*, by counsel for the defendant that this sub-rule preserved the common law principle that a court has no power to set aside a final judgment or order disposing of proceedings after it has been entered. It was held, *inter alia*, that this sub-rule is clearly intended to apply to all judgments or orders of the type described that are entered or made in the circumstances described.

16. This decision is consistent with the Respondent’s argument that the exercise of power by the primary judge was conferred by Order 12, rule 8 (3), which power to set aside is not confined to interlocutory orders only but extends to final orders as well.

17. It follows from these considerations that there was a valid exercise of power by the primary judge to set aside the *ex parte* order which dismissed the proceedings for want of prosecution. I would dismiss the appeal on the jurisdictional argument for these further reasons.

18. As to the merits of the appeal against the exercise of discretion by the primary judge, I concur with Sawong & Neill JJ and have nothing further to add. I would dismiss the appeal and remit the matter to the National Court for directions hearing on a date to be fixed. I would further order the First, Second and Third Appellants to pay the costs of the Respondent, to be taxed, if not agreed.

Background

19. **SAWONG & NEILL, JJ:** This is an appeal from the decision of Cannings J given on 19 September 2013 (**decision**), when he set aside the Orders made by Murray J on 25 April 2013.

20. Murray J had granted an application (**dismissal application**) by the Appellants to dismiss the National Court proceedings which the Respondent (as plaintiff) had brought against the Appellants (as defendants) claiming damages for physical injuries and other loss which he suffered at their hands (**claim**).

21. The Appellants’ counsel did not dwell on the claim. His abbreviation of the facts may have been because the Statement of Claim details such matters as the Respondent was:

♣ thrown from a window 3 metres high;

♣ threatened at gun point;

- ♣ gun-butted;
- ♣ lashed with wooden sticks and a bulldozer fan belt;
- ♣ punched and booted over his body and face;
- ♣ cut with a bush knife, etc.

22. These matters Cannings J labelled as Human Rights violations.

23. The First, Second and Third Appellants are represented by counsel on this Appeal. The Fourth, Fifth and Sixth Appellants are not represented by the Solicitor General or anyone on their behalf. For convenience only, we refer to the First, Second and Third Appellants generically as Appellants (**Appellants**).

24. In addition to glossing over the facts, the Appellants said that the issue of service of the dismissal application was not raised in the appeal and that only the application of Order 12 Rule 8(3) (**Rule 8(3)**) of the *National Court Rules (Rules)* was the subject of the appeal.

25. Initially the Respondent had Jerowai Lawyers (**Jerowai**) act for him in the claim.

26. At the outset we have to note that the Appeal Book has multiple copies of the same documents and many unnecessary papers. The volume could be reduced from almost 292 pages to about half that number of pages.

Service of dismissal application

27. On 8 November 2012 the Appellants' lawyer "served" at the physical office of Jerowai, by leaving under the gate, a Notice of Discovery and List of Documents as to which their clerk deposes in his affidavit sworn 1 February 2013. This affidavit also notes these papers were filed on 21 March 2012. Curiously, there is in the Appeal Book (**AB**) a file note that those Jerowai premises were "empty" when the clerk went there in November 2012.

28. It is not unusual for lawyers to change premises. However, it does not seem from the AB that there was any effort by the Appellants' lawyer to locate the new premises of Jerowai. Instead, it was by post the Appellants' lawyers sent to Jerowai a letter dated 17 April 2013 purporting to enclose a copy of the papers "left under the gate" some 5 months previously. This was obviously to set up the conditions precedent that would lead to a dismissal application.

29. This type of "service" is permitted under various pieces of legislation. But is it effective in bringing to a party's notice whatever is in the envelope supposed to have been posted and then delivered "in the ordinary course of mail"?

30. It seems that sometimes lawyers bank on the notorious inefficiency of PNG Post at delivering mail, who knows how long, if ever, after “posting”.

31. In this case, the letter was posted at the Port Moresby Post Office and the intended addressee Jerowai had a post box at the Port Moresby Post Office. It cannot be assumed that the clerk in that post office sorted the mail. The process may be that all mail has to go to Central Mail Exchange. As judges we cannot be blind to the reality of the situation of the unreliability of PNG Post nor persist in accrediting a system which does not work all the time or is otherwise ineffective.

32. In a previous century a learned commercial English judge wrote the law as to acceptance of a contract. The rationale was that posting a letter of acceptance was all that the offeree could do to accept an offer. Nowadays in Papua New Guinea a lot more than posting something has to be done to give effective notice of a matter to another party in the litigation.

33. What is effective service of a notice, such as in this case, can be different things depending on the circumstances, for example: email; facsimile; personal delivery; newspaper advertisement; announcements over local radio (when it is a popular source of information); nailing notices to fences.

34. But litigants have to make that effort or even as in this case, call the Law Society to find out Jerowai’s new address. The Respondent’s lawyer’s notice of change of lawyers was not filed until 9 August 2013.

35. Counsel for the Appellants, in reply, says that the Respondent has not raised the issue of service and there would be injustice, if the Court on appeal would do so. Curiously, both Murray J and Cannings J found that there was service of the dismissal application. We disagree with both their findings.

36. Jerowai say in their affidavit about this purported service, simply this: We never got the notice and papers deposed to in the Appellants’ lawyer’s affidavit of service. Jerowai was lax but the fact is that the Respondent was not aware of the action to dismiss his claim due to no effective service of the application.

37. In *Rangip v Loko & Ors* [2009] N3714 (**Rangip**) the Court noted (at paragraph 41) that the negligence of a lawyer is not a good reason for an extension of time to be granted (citing *Donigi v Base Resources Ltd* [1992] PNGLR 110). But this appeal is not just that Jerowai could have done a better job of maintaining an eye on his client’s file, it is a situation where Jerowai and hence the Respondent did not get notice of the application.

38. It is not justice for the damages which the Respondent may receive if his claim is adjudicated upon, to be paid by lawyers who were not involved in the case. A generic spread of damages in this way across the legal profession by Indemnity Insurance, allows the wrongdoers to avoid completely facing the

Respondent in court. It is justice for them to respond to him in court.

39. The Appellants' counsel in reply to the issue raised by the bench as to effective service said: "it would be unjust" for the matter of service to be raised at the appeal stage as it was not pleaded and the Appellant is "caught unawares". Nonsense!! To suggest that, the Appellants' lawyers and eminent Counsel would be caught *unawares* points to their conceding this was a genuine issue, that they were well aware of the issue and of the Appellants' inability to give a response to this issue of Justice.

40. In this Appeal we give clear directions that "quickie judgements" by failure, in reality, to inform all the parties of an intended application to dismiss will result in the application not proceeding until there is effective service and any order based on the application will be liable to be set aside.

Jurisdiction argument

41. A significant conflict of views is expressed in various opinions and judgements by members of the National Court and this Court on Rule 8(3).

42. In essence the issue of the parties in this appeal over Rule 8(3) is: The Appellants say that the order of Murray J is a final order and so the only avenue for a disappointed litigant, who is subject to an order made in their absence, is an appeal. This is the first leg of the Appellants' appeal (**final order - appeal only option**).

43. The Respondents rely on Rule 8(3) as providing the basis for the Respondent's application before Cannings J and his decision, in that Rule 8(3) does give an alternative to not go on appeal to the Supreme Court. In the circumstance set out in the Rule, a person who is affected by an order made in his absence may go to another judge or the same judge of the National Court. This is the Respondent's argument (**Rule 8(3) is the alternative to appeal**).

44. Broadly speaking, the philosophy behind the differing views is, on the one hand a concern for finality of litigation and to prevent a litigant dragging out a matter by abusing the Rules. On the other hand there is a concern to not let a litigant be denied the opportunity to present his case where there is good reason for his failure to attend court on a dismissal application.

45. Order 12 Rule 8(3) (a) provides as follows:

8. Setting aside or varying judgement or order

(3) The Court may, on terms, set aside or vary an order –

(a) where the order has been made in the absence of a party, whether or not the absent party is in default of giving a notice of intention to defend or otherwise in default, and whether or not the absent party had notice of motion for the order;

Final order - appeal only option

46. The Appellants say that the structure of appeal in Papua New Guinea requires that a final order of the National Court can only be overturned by an appeal to the Supreme Court. It follows from that argument that the dismissal for want of prosecution is categorised as a final order so it must go on appeal.

47. The other view is that Rule 8(3) gives an alternative to appeal. Notably, this Rule gives the right to come to Court regardless of whether the party was served with a notice. Hence an order in these circumstances cannot be final for the obvious reason that the Rules provide an alternative to an appeal.

48. To that extend the Appellants are correct in saying that the matter of service is a “dead issue”. But that does not mean that an applicant is not obliged to give the other party notice of their application, as required by, say Order 4 Rule 38 (to name one example) in the Rules.

Analysis of Appellants’ authorities

49. Some of the cases which the Appellants say support their view are:

♣ *Smith v. Ruma Constructions* [2002] SC695 (**Smith**)

♣ *Malt v. Queen & Anor* [2009] N3577 (**Malt**)

♣ *NCDC v. PNG Water Ltd & Ors* [1999] SC624 (**NCDC case**)

50. **Smith** (Kapi DCJ, Los and Kandakasi JJ) dealt with Order 12 Rule 8(2) (i.e. set aside a judgement) not Order 12 Rule 8(3) (a) (i.e. set aside an order). The facts in the appeal before that Court were that summary judgement was entered on 10 November 1997 for Smith in regard to his claim for specific performance of a contract for sale. Though an application for leave and notice of appeal were filed by the defendant in that action on 19 December 1997, the application for leave did not proceed until March 1999. The application for leave was dismissed and a year later the defendant filed his application under Order 12 Rule 8(2).

51. Kapi DCJ cited *Green & Co v. Green* [1976] PNGLR 73 (Green) that held the onus is on the applicant who seeks to set aside a default judgement to satisfy the Court:

- (a) Why the judgement was allowed to be entered in the applicant's absence;
- (b) A reasonable explanation for delay if there has been a delay in making the application to set aside the default judgement;
- (c) That there is a defence on the merits.

It was by then 5 years since the summary judgement has been entered and the appeal was dismissed.

52. It is noteworthy that *Smith* dealt with a different subrule to the present appeal. Order 12 Rule 8(1) and (2) gives extensive powers for the National Court to vary or set aside an order of the National Court, for example in the situation of entry of default judgement and a direction given in the absence of a party. However, Kapi DCJ did consider his view on Rule (2) to have application to Rule (3).

53. In the present appeal there is an explanation for the judgement to be entered, i.e. no effective service and while the Respondent has not provided evidence to support his claim of being injured by the Appellants, the very serious nature of the claim makes us hesitant to discount his claim. There was no delay in the Respondent's application to Cannings J.

54. *Malt* was a decision of the National Court Mt Hagen. It concerned land claimed by the applicant, who had been evicted. Some 2 years passed before the dismissal application was filed. A further 11 months passed before the dismissal application came on before the Court, when the dismissal order was made in the absence of the other party. The application was made in a generic way under "Rule 8" without specifying the applicable subrule.

55. *Malt* is an illustration that hard cases make bad law. The outcome was correct but the reasoning to reach that conclusion was flawed. There was delay in making the application but there was no adequate explanation for that delay. All that the applicant said on the matter of delay was the applicant had let the period for filing an appeal pass and so he then tried the Order 12 Rule 8 process. That was not a "reasonable explanation" for the delay as contemplated by *Smith* or *Green* (see above paragraph 32(b)). The *Malt* application was properly dismissed. *Malt* is contrary to the express wording of Rule 8(3) and at odds with the early Supreme Court decision of *Smith* and the statement to the contrary in *Malt* at paragraphs 14, 19, 20 and 21 and in some of its later paragraphs, is no longer of authority.

56. The *NCDC case* (Los, Jalina and Injia JJ) concerned an application for leave to appeal. The respondent objected to its competency. Leave was sought as the National Court proceedings had been dismissed for want of prosecution.

The appellants there had not sought to apply under Rule 8(3) but chose the alternative of appealing to the Supreme Court.

57. Plainly in that situation, having made the choice of method to overturn the decision of the lower court by an appeal, that decision is a final order. That is what the Supreme Court found. The *NCDC case* does not restrict a litigant's choice of method to follow i.e. Rule 8(3) or to appeal, but having made the choice/election to appeal, the lower court order becomes a "final order".

Rule 8(3) is alternative to appeal

58. The issue of what is meant by *ex parte* does not arise as the term is not used in Rule 8(3). The phrase *ex parte* has various meanings, for example one meaning under Order 16 of the Rules. With Rule 8(3) all that has to be shown is that a party did not appear. There is no restriction on the meaning of "absence of a party" or what could be meant by "in default" or whether or not the absent party had notice of the motion for the order.

59. *Ritchie Uniform Civil Procedure (NSW)*, in relation to the NSW equivalent of our Rule 8(3) (NSW Supreme Court Practice Part 40, r 9(3) indeed on which our Rule was based) notes: "It is a fundamental principle that persons likely to be adversely by orders have a right to be heard".

60. *Ritchie* cites *Cameron v. Cole* [1943-1944] 68 CLR 571 and *Greig & Anor v. Australian Building Industries Pty Ltd* [2002] QSC 138. The High Court case of *Cameron* related to a sequestration order made in the absence of a debtor. The order was later annulled and the bankruptcy petition reheard when a second sequestration order was made. The debtor has not received a notice of the hearing. In regard to the second order Rich J said (page 589):

"It is a fundamental principle of natural justice, applicable to all courts ..that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled..to have any determination which affects him set aside."

61. *Greig's* case involved a company liquidation where an application to extend time was made *ex parte*. Chesterman J of the Queensland Supreme Court noted *Cameron* with approval and also statements of the Australian High Court in its decision of *Annetts v. McCann* (1990) 170 CLR 596 in regard to legislative intent:

"The requirements of natural justice will only be 'excluded by plain words of necessary intendment' and 'that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from indirect references, uncertain inferences or equivocal considerations'."

62. We see the Appellants' submissions on the appeal system in PNG in regard to Rule 8(3) as not "establishing an intention on the part of the legislature to exclude the rules of natural justice".

63. The PNG case for the Respondent's view is: *Rangip v. Loko & Ors* [2009] N3714. In turn it refers to *Nicholson v. Nicholson* [1974] 2 NSWLR 59, a family law case concerning an ex parte application regarding the family home.

64. In *Nicholson* the head note succinctly states in regard to the NSW rule:

- ♣ The rule is not limited to interlocutory orders, but applies also to final orders;
- ♣ The rule constitutes an exception to the principle that a court had no jurisdiction, except on very limited grounds, to vary or set aside the operative and substantial part of a final order;
- ♣ For an application under the rule to succeed, there must be some injustice arising from circumstances in which the judgement was made.

65. *Rangip* reiterated the principles in *Green* and found there was no abuse of process and the requirements in *Green* (see paragraph 32 above) had been met. The dismissal order was set aside.

Synthesis and conclusions for decision

66. It is apparent that in the present appeal:

- ♣ There is an explanation for the Respondent not appearing on the dismissal application and judgement being entered in his absence.
- ♣ There was no unreasonable delay in applying under Rule 8(3) to set aside the dismissal.
- ♣ There is a claim which merits adjudication by the Court.

There was no abuse of process and in all the circumstances it is just for the order made by Canning J to not be disturbed.

67. Our Rules have been adapted from the *New South Wales Supreme Court Practice* and Rule 8(3), in its entirety. The drafters of our Rules after Independence did not mindlessly 'cut & paste' the NSW Practice rules. It was done by selection of what would be appropriate to this young country and its

particular difficulties.

68. It may be that the drafters took into account such matters as the difficulties of transport and communication which might cause a litigant to miss a court hearing. And the drafters seem to have also noted such matters as the practicality of ordinary citizens in mounting an appeal to the Supreme Court.

69. What the drafters ensured in Order 12 Rule 8(3) was an effective, convenient and economically feasible procedure to redress the injustice which can and does happen when a litigant has not had the opportunity to attend court and a decision is made in their absence without the litigant putting “their side of the story”.

70. We reject the “jurisdictional” argument of the Appellants and find that there was valid exercise by Cannings J of the jurisdiction empowered under Rule 8(3). The Appeal is dismissed on that ground but we also deal with the merits of the claim.

71. We do not consider that Rule 8(3) will be abused. The requirements in *Green* and our Rules address the problem of abuse of process. We see Rule 8(3) as speedy, cost effective and a convenient alternative to an appeal in the interest of Justice.

Merits of the claim

72. We noted earlier that the 292 pages of the AB, does not inform of the facts. Hence, we appreciate the argument of the Appellants that nowhere in the AB is there a medical report about the injuries that were inflicted on the Respondent. Nor is there an affidavit by him about the injuries or the facts of the claim. We are mindful that many Statements of Claim make exaggerated claims of injuries and which are found to be baseless when examined in evidence.

73. We do not also want to fall into the blinked error shown in this matter of focusing on the shortcoming of lawyers involved in the National Court proceedings and ignore the issues. The matters in the Statement of Claim are detailed to the extent that they have not been shown to be fanciful or untruthful. The coyness of the Appellants’ lawyers in not wanting to go into the issues of the claim nor filing any affidavits to contradict the facts pleaded in the Statement of Claim, defeats the Appellants trying to assert a ground that the claim lacks merit.

Order

1. The Appeal is dismissed. The matter is returned to the National Court for directions with a view to the matter being set down for trial at the earliest convenience of the Court.

2. The costs of the Respondent on the Appeal shall be paid by the First, Second and Third Appellants jointly and severally, to be taxed if not agreed by 20 September 2016.
3. There is no order for costs against the Fourth, Fifth and Sixth Appellants.
4. Time abridged to the date of settlement which shall be forthwith.

Allens Lawyers : *Lawyers for the First, Second and Third Appellants*
Ame Lawyers : *Lawyers for the Respondent*