

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS 635 OF 2017

BETWEEN:
JIMMY MOSTATA MALADINA

AND
THE STATE

Waigani: Polume-Kiele J
2017: 5 & 7 December
2018: 14 February

PRACTICE AND PROCEDURE—Application for Default Judgment (liquated sum of K2, 650,000.00) to be entered against the Defendant – Order 12 Rule 25 (b) and Order 12 Rule 27 (1) & (2) – National Court Rules - Relevant considerations.

PRACTICE AND PROCEDURE—Application for Default Judgment (summary judgment for sum of K2, 650,000.00) to be entered against the Defendant – Order 12 Rule 38 – National Court Rules – Relevant considerations.

Brief Background Facts

On the 6th of July 2017, the Plaintiff filed these proceedings claiming a sum of K2, 650,000.00 plus interest and costs of the proceedings. Service on the State were effected on the Solicitor General on the 11th of July 2017 at about 11.00 a.m. On the 20th of July 2017, The Solicitor General filed a Notice of Intention to Defend on behalf of the Defendant (State). The State failed to file a Defence to the claim. Thus the application for default judgment. These proceedings stem from the criminal proceedings *CR (FC) 402 of 2004; The State and Jimmy Mostata Maladina* (2015) N6049 in which on the 21 May 2015, the Plaintiff was convicted on the following charges namely:

“First Count:

Jimmy Mostata Maladina of Mena’ala, Esa’ala, Milne Bay Province stands charged that he, between the 1st day of November 1998 and the 10th day of October 2000, at Port Moresby, National Capital District in Papua New Guinea, did conspire with Herman Joseph Leahy, Henry

Fabila, Shuichi Taniguchi, Kazu Kobayashi and other persons to defraud the National Provident Fund Board of Trustees of the sum of K2,650,000.00 by fraudulently increasing the construction costs of the National Provident Fund Tower situated at Douglas Street, Port Moresby, National Capital District.

Second Count:

Between 26 February 1999 and 30 July 1999, at Port Moresby, National Capital District, he dishonestly applied to his own use and to the use of others the sum of K2, 650,000.00, the property of the National Provident Fund Board of Trustees.”

The charge of dishonestly applying property to his own use or to the use of others was brought under s.383A (i) (a) of the *Criminal Code*. It reads:-

“383A. Misappropriation of property

(1) A person who dishonestly applies to his own use or to the use of another person—

(a) property belonging to another; or

(b) property belonging to him which is in his possession or control (either solely or conjointly with another person) subject to a trust, direction or condition or on account of any other person,

is guilty of the crime of misappropriation of property.”

The penalty provision for misappropriation of property is under subsection 2. It reads:-

“(2) An offender guilty of the crime of misappropriation of property is liable to imprisonment for a term not exceeding five years except in any of the following cases when he is liable to imprisonment for a term not exceeding 10 years.

(a).....

(b).....

(c) where the property dishonestly applied was subject to a trust, direction or condition; or

(d) where the property dishonestly applied is of a value of K2,000.00 or upwards.”

Held

1. Order 12 Rule 32 of the National Court Rules (general) gives the Court wide discretion to enter default judgment: *Kante Mininga v The State & 2 Ors* (1996) N 1458.
2. Equally, the law is well-settled that entry of default judgment is not a matter of right even where the preconditions set out in *Giru v Muta* [2005] PNGLR 387 and *BSP v Tingke* (2012) N4901 are satisfied, the decision whether or not to order default judgment remains a discretionary matter for the court: *Agnes Kuntun & Ors v John Junias & Ors* (2006) SC929; *Lambu v Torato* (2008) SC953; *Lina Kewakali v The State* (2011) SC1091.
3. The plaintiff's claim is based on the premise of a 'mistake'. A claim for damages in term of 'mistake' usually involves a contractual agreement; 'mistake' is more confined to matters involving law of contract. (*Putput Logging Pty Ltd v Phillip Ambalis* [1992] PNGLR 159) that is; pleading the validity of agreements, or contract and his entitlement to sue in a civil claim.
4. Where the statement of claim is inadequately pleaded and the inadequacies are significant, it can lead to a conclusion that the pleadings do not disclose a reasonable cause of action: *Motor Vehicles Insurance Ltd v Nominees Niugini Ltd* (2015) SC1435.
5. The law on summary judgment is well settled in this jurisdiction, *Bruce Tsang v Credit Corporation (PNG) Ltd* [1993] PNGLR 112. Two elements must be met before there could be an order for judgment under Order 12 Rule 38 and these are: "(a) there must be evidence of the facts proving the essential elements of the claim; and (b) that the Plaintiff or some responsible person gives evidence in his belief that there is no defence to the claim." The plaintiff has failed to satisfy these elements.
6. Consequently, the application for default judgment under Order 12 Rule 25 (b) and 27 (1) and (2) of the *National Court Rules* or alternatively summary judgment under Order 12 Rule 38 of the *National Court Rule* is refused.

Cases Cited:

CR (FC) 402 of 2004; The State and Jimmy Mostata Maladina (2015) N6049
Kante Mininga v The State & 2 Ors (1996) N1458
Giru v Muta [2005] PNGLR 387
BSP v Tingke (2012) N4901
Kunkene v Rangsu & the State (1999) N1917
Laki v Alaluku (2000) N2001
Jimmy Mostata Maladina v The State (2016) SC1495
Robert Darragh v Robert Kayumu (2015) N6068
Bella Kitipa v Vincent Auali (1998) N1773

Agnes Kuntun & Ors v John Junias & Ors (2006) SC929
Lambu v Torato (2008) SC953
Lina Kewakali v The State (2011) SC1091
Motor Vehicles Insurance Ltd v Nominees Niugini Ltd (2015) SC1435)
Putput Logging Pty Ltd v Phillip Ambalis [1992] PNGLR 159
National Provident Fund Board of Trustees v Maladina (2003) N2468
Bruce Tsang v Credit Corporation (PNG) Ltd [1993] PNGLR 112

Counsel:

Mr Ian Molloy, with Ms L David, for the Plaintiff
Mr V Gonduon, for the State

RULING

14th February, 2018

1. **POLUME-KIELE J:** On the 7th of December 2017, the Plaintiff by a Notice of Motion filed on the 16th of November 2017, seeks order pursuant to Order 12 Rule 25 (b) and Order 12 Rule 27 (1) and (2) of the *National Court Rules* that default judgment be entered in the liquidated sum of K2, 650,000.00 against the Defendant; and alternatively, summary judgment be entered against the Defendant in the liquidated sum of K2, 650,000.00 pursuant to Order 12 Rule 38 of the *National Court Rules* plus costs and interest.

2. The plaintiff claims the sum of K2, 650,000.00; monies paid in full as restitution to the State (in Criminal Proceedings *CR (FC) 402 of 2004; The State and Jimmy Mostata Maladina* (2015) N6049). The plaintiff was convicted of dishonestly obtaining the said sum before the National Court. A sentence of 8 years was wholly suspended and was placed on a 2 year good behaviour bond. On appeal the Supreme Court on the 26th of July 2017, quashed the conviction and sentence and ordered a refund of the Bail money. There is no ruling as to the restitution of the sum of K2, 650, 000.00 to the Plaintiff.

Plaintiff's Submission

3. Mr Molloy for the Plaintiff submitted that the application is made by way of a Notice of Motion filed on the 16th of November 2017 seeking entry of default judgment in the liquidated sum K2, 650,000.00 pursuant to Order 12

Rule 25 (b) and Rule 27 (1) and (2) of the *National Court Rules* and alternatively summary judgment be entered against the Defendants in the liquidated sum K2, 650,000.00 pursuant to Order 12 Rule 38 of the *National Court Rules*; plus costs and such other orders the Court deems necessary.

4. The application is supported by a number of affidavits: firstly the affidavit of Mr Vincent Akwila sworn on the 12th of July 2017 and filed on the 13th of July 2017 deposing to service of the writ of summons which was filed on the 5th of July 2017 on the 11th of July 2017 on Ms Linda Wonuhali, Senior Executive Assistant, of the Department of Attorney General as per the affidavit of service of Vincent Akwila sworn on the 12th of July 2017.

5. An affidavit of Search conducted by Ms Lydia David sworn on the 14th of November 2017 and filed on the 16th of November 2017; in which she deposed to conducting a search of the Court File on the 25th of October 2017 and discovering that since the filing and service of the Writ on the Solicitor General on the 11th of July 2017 and filing of a Notice of Intention to Defend on the 20th of July 2017, the Defendant had failed to file a Defence to the Claim.

6. Further, an affidavit of the plaintiff sworn on the 23rd of November 2017 and filed on the 24th of November 2017.

The Defendant's submission

7. In response to the application for default judgment, Mr Gondouon for the State submitted that the entry of default judgment is not a matter of right, but of discretion. Order 12 Rule 32 of the *National Court Rules* (general) gives the Court wide discretion to enter default judgment as established in *Kante Mininga v The State & 2 Ors* (supra), Injia J (as he was then), stated:

“Order 12 Rule 32 (general) of the National Court Rules gives the Court a wider discretion to enter default judgment, even when proof of due service of process on the defendant and proof of default is established by the applicant/plaintiff the Court still has discretion to

refuse entry of default judgment”

8. In this regard, this Court has discretion to exercise its powers in determining whether to grant entry of default judgment even if the applicant/plaintiffs have satisfied all the requirements or pre-conditions established in *Giru v Muta* [2005] PNGLR 387.

9. The Defendants further submit that before this Court decides how to exercise its discretion, it must take into account a wide range of considerations which include the question of whether the defendants appear to have a good defence and the extent of default by the defendant (*Kunkene v Rangsu & the State* (1999) N1917) whether the pleadings are vague, i.e. whether the statement of claim discloses a reasonable cause of action (*Laki v Alaluku* (2000) N2001). This is because, even if the plaintiffs establish proof of due service of process on a defendant and proof of default, the Court still has a discretion to refuse to enter default judgment in cases where the effect of the default judgment would prejudice the rights of other co-defendants, or that the pleadings are so vague or do not disclose a reasonable cause of action or that the default cannot be sustained in law..”: (*Kante Mininga v State* (supra)).

10. Counsel for The State further submitted that entry of default judgment cannot be sustained as there is no ruling made by the Supreme Court in *Jimmy Mostata Maladina v The State* (2016) SC1495 as to the reimbursement of any monies paid as restitution. In addition, whilst there is an order quashing the conviction and sentence, no order of court relates to the reimbursement or an acknowledgment that if there exist a civil claim for the monies paid as restitution, there is no clear ruling made by the Supreme Court in SC1495 (supra).

11. Furthermore, there is no substantive delay in filing a defence. The delay is only a month in failure to file a Defence. Whilst appreciating the efforts of Counsel for the State, there is no Notice of Motion nor affidavit in support of the application to file a defence out of time.

12. I note however, in the same application, the defendants are seeking leave of court to file a defence out of time but there is no proper application supported by an affidavit providing reasons for the delay or a draft defence on the merits.

13. Mr Gondouon submits however that as it is, the pleadings is quite ambiguous and failed to disclose that there was a specific Court Order or its terms that provides for the plaintiff’s money that was paid as a form of

restitution shall be refunded or reimbursed forthwith. He submits further that the Defendant has a defence on merits and needs to be heard before liability can be settled. Therefore on the balance of probabilities, given the circumstances in their default, seek grant of leave in allowing the state time to file a defence out of time.

Issue

14. In determining this application, a number of issues need to be raised and considered and these relate to the following:

- (i) What is the definition of “restitution”?
- (ii) Whether the payment of the sum of K2, 650,000.00 made to the State as restitution gives rise to a reasonable cause of action against the State?
- (iii) Whether the payment of the sum of K2, 650,000.00 made to the State; as restitution in relation to criminal proceedings, (*CR (FC) 402 of 2004; The State and Jimmy Mostata Maladina* (2015) N6049) “without justification”?
- (iv) Whether default judgment or summary judgment for a liquidated sum of K2, 650, 000.00 be entered against the State?
- (v) Given these factors, whether default judgment should be entered against the (State) Defendant for failure to file a Defence within the requisite time stipulated under s 9 (a) (i) of the *Claims By and Against the State Act* 1996?

The Law

15. The Plaintiff’s application is made pursuant to Order 12 Rule 25 (b), Rule 27 (1) & (2) and Order 12 Rule 38 of the *National Court Rules*.

Consideration of the Application

16. On 6th July 2017, the plaintiff filed these proceedings claiming a sum of K2, 650,000 plus costs of the proceedings. He had filed the writ and subsequently served on the Solicitor General on 11th July at about 11:00 a.m. On 20th July 2017 the Solicitor General had filed a notice of intention to defend per defendant; that is the State. The reason the application for default judgment and alternatively summary judgment was made before the court is that the State had failed to file a defence to the claim.

17. The proceedings more or less stem or originated from a criminal proceeding titled CR (FC) 402 of 2004, *The State v Jimmy Mostata Maladina* (2015) N6049. A decision was handed down sometime on the 21 May 2015. The plaintiff was charged and convicted on two counts of criminal offences:

- (i) The first count was that Jimmy Mostata Maladina of Mena'ala, Esa'ala, Milne Bay Province stands charged that he between 1 November 1998 and 10th October 2000 at Port Moresby, National Capital District in Papua New Guinea, did conspire with Herman Joseph Leahy, Henry Fabila, Suichi Taniguchi, Kazu Kobayashi and other persons to defraud the National Provident Fund Board of the Trustees of the sum of K2.65 million by fraudulently increasing the construction costs of the National Provident Fund Tower situated at Douglas Street, Port Moresby, NCD.
- (ii) The second count was that between 26th February 1999 and 30th July 1999 at Port Moresby, National Capital District, he dishonestly applied to his own use and to the use of others the sum of K2.65 million the property of the National Provident Fund Board of Trustees.

18. These charges were heard by the National Court in which a sentence of eight years was passed but wholly suspended. This is where the claim for the sum of K2, 650,000.00 arises from. Pending sentence, the plaintiff had paid and I would quote from paragraph 4 of this affidavit in which he stated and I quote: *'that the payment of 2,650,000 was paid specifically as restitution to the State.'*

19. The Plaintiff now had subsequently filed a claim against the State for the reimbursement or refund of the said sum of K2, 650,000.00 claiming that the payment was made as or upon “mistake”.

20. Given that, I find that this is contrary to the statement made in his affidavit sworn on the 23rd of November 2017 and filed on the 24th November 2017 in which he says that it was paid in full restitution to the State. He relies, as per submissions from his counsel, Mr. Molloy, on the case of *Robert Darragh v Robert Kayumu* (2015) N6068, to support his claim. The facts of the case of *Robert Darragh* (supra) are that the respondent in that application was stood down without pay as a result of the allegation of complicity in theft. He filed proceedings in the District Court claiming damages for unlawful termination of employment, defamation and other causes.

21. Subsequently, an order was made by the District Court for a sum of K5000 in his favour. The defendant who is the applicant applied to set aside that order, some of the reasons for the application to set aside being that even though a District Court order was made for a sum of K5000, for some reasons, the minutes taken out by the plaintiff had increased somewhat to a sum of about K7000 plus. His Honour Justice Higgins in hearing the application to set aside; held that the orders taken out by the Plaintiff/Respondent did not correspond with the original orders of the District Court granted by the District Court in the Plaintiff’s favour and consequently set aside the District Court Order. In his judgment, his Honour Justice Higgins at paragraph 56 referred two different issues – to the word “unjust enrichment” in which he stated and I quote:

“Unjust enrichment” is an equitable principle requiring the repayment of monies or property given by mistake or otherwise so that it ought, as a matter of justice, be refunded or surrendered unless the claimant for relief has to rely upon an illegal contract.”

22. In this case, this is not a matter in which the claim, as I see it, is not a matter in which a party, in this case, the plaintiff can claim an unjust enrichment because it is not a matter or a claim in which the sum of K2, 650,000.00 was paid by mistake. The plaintiff knew very well why this matter or this payment was made; it was not a mistake. And furthermore, it is not a payment as a result of an illegal contract because there are no pleadings within the statement of claim that the payment was made as a result of an illegal contract. And, therefore, reliance on this particular case *Robert Darragh v Roman Kayumu* (supra) is misconceived.

23. At the same time, this court notes the Defendant has more or less defaulted in filing a defence under section 9 (a) (i) of the *Claims Act*. The court also notes there was no proper application filed by the defendant seeking leave of court to file a defence out of time, although Mr Gondouon has briefly made mention of an application for leave to extent time to file a Defence out of time.

24. However, given that this is an application for entry of default judgment, the rules applicable and the checklist applicable to default judgment applications as per the case of *Giru v Muta* [2005] PNGLR 387 be satisfied. However, the application for default judgment is not a matter of right even if preconditions in *Giru v Muta* (supra) has been met or satisfied.

25. The court still has wide discretion to decide or determine whether or not default judgment can be granted. Case laws supporting the exercise of discretion are clearly established in the case of *Agnes Kuntun and others v John Junias and others* (2006) SC929, *Lambu v Torato* (2008) SC953, and *Lina Kewakali v The State* (2011) SC1091.

26. In considering the application, this court also would make reference to the case of *Bella Kitipa v Vincent Auali* (1998) N1773 in which the court exercising discretion would also take into account other situations, and this is on the grounds that the court has wide discretions to enter default judgment as held in the case of *Kante Mininga v The State* (1996) N1458 in which his Honour Justice Injia (as he was then) held that Order 12 R ule 32 of the *National Court Rules* gives this court wide discretions to enter default judgment even when proof of due service process on a defendant and proof of default is established by the plaintiff.

27. This court still has discretion to refuse to enter default judgment, particularly when the effect of a default judgment would prejudice the rights of other co- defendants – and so this court notes that only the State is named as a party – or in case where the pleadings are vague and do not disclose a reasonable cause of action and where the default judgment cannot be sustained in law (see *Bella Kitipa v Vincent Auali* (1998) N1773).

28. In determining that issue, this court has taken liberty to make reference to the case of the *National Provident Fund Board of Trustees v Maladina* (2003)

N2468 in which His Honour Justice Kandakasi in consideration of the application by NPF for summary judgment against defendants named in that proceedings, his Honour referred to the leading authority on summary judgments in Papua New Guinea and that is the case of *Bruce Tsang v Credit Corporation (PNG) Ltd* [1993] PNGLR 112. In that case, the Supreme Court held two elements must be met before there could be an order for judgment under Order 12 Rule 38 and these are – and I quote:

- “(a) *there must be evidence of the facts proving the essential elements of the claim; and*
- (b) that the Plaintiff or some responsible person gives evidence in his belief that there is no defence to the claim.”*

29. This court has taken the liberty to go through the evidence of the plaintiff, and that is the evidence that he swore in support of this application on 23 November 2017 and filed on 24 November 2017 and I find no evidence to suggest or given by the plaintiff that there is no defence to the claim. In the same affidavit, the plaintiff had deposed to the fact that the defendant in this case has been unjustly enriched and that the plaintiff/applicant is entitled to the repayment of moneys.

30. Further, I have taken the liberty to also research the definition of “restitution” and I make references to the definition as extracted from the Sixth edition of the Oxford Dictionary of Law (2006) and the definition contained here is that:

“Restitution as the return of property to the owner or persons entitled to possession. If one person has unjustly received either property or money from another, he has an obligation to restore it to the rightful owner in order that he could be unjustly enriched or retain an unjustified advantage. These obligations exist when, for example, goods or money have been transferred under compulsion – that is duress – under mistake in which this application is made or under a transaction that fails because of illegality, lack of formality or for any other reason or, when the person who has taken the money has acquired a benefit through his actions without justification...”

31. As referred to earlier in the reading of this judgment, there is no pleading in the statement of claim to alert the defendants as to how this cause of action has come before this court because this runs counter to the affidavit of the plaintiff in which he had stated in paragraph 4: *“In consequence of the National Court convictions and pending sentence, I paid the sum of K2, 650,000 for the express purpose of restitution in relation to the conviction.”* So, should this payment now be claimed as being paid without justification?

32. I am of the view that this is not. The payment was made with knowledge of the plaintiff. It was not a payment made under compulsion or duress or under a transaction that fails because of illegality or lack of formality. A mistake could only be in relation to a breach of contract or commercial transaction not as it is pleaded.

33. Given that, while this court also notes that that conviction and that sentence has been overruled and quashed, there are no specific references as to the repayment or reimbursement of the sum of money. There is a reference, however, to a refund of that bail money which in any criminal proceedings is the conviction or sentence is quashed, bail money is automatically refunded. This is not the case here.

34. So, therefore, in the absence of any clear indication as to how this matter or the plaintiff can come before the court and claim ownership of the sum of K2,650,000.00; that is an issue that needs to be determined. Because according to the evidence provided by the plaintiff himself, particularly, in relation to the proof of payment, that is in relation to the annexure attached to his affidavit which is marked as "JMI" which is a copy of the cheque, upon proper perusal of the cheque, this court notes that although the receipt of the money was from the plaintiff, the cheque which is attached to that affidavit, cheque number 00113, ANZ bank is made on the account of Isles, I-s-l-e-s, Builders and Const., Kokopo Branch.

35. So if any person would be entitled to this sum of money, it would be the drawer of the cheque or the drawer of that account and would it be Isles Builders and Const. These are details that are not pleaded or may be parties not named to these proceedings. So who is the rightful claimant of that sum of money? That is a question to be determined.

36. Furthermore, the statement of claim or the pleadings in this case do not plead whether or not there is a cause of action and or a connection between the plaintiff and the defendant. Yes, there are no clear pleadings as to the ownership or persons entitled to the said sum of K2, 650,000.00 (see *Motor Vehicles Insurance Ltd v Nominees Niugini Ltd* (2015) SC1435).

37. Consequently this court, in the exercise of its discretion refuses the

application for default and or summary judgment, and I refer to the case of *Putput Logging Pty Ltd v Philip Amabalis* [1992] PNGLR 159 in which the main issue before the court was in relation to the principles of natural justice. Although there is allegation that the money was paid by mistake, the evidence before this court is that the payments were made with full knowledge of the plaintiff.

Conclusion

38. So in conclusion, this court finds that the plaintiff/applicant has not met all the requirements identified in the case of *National Provident Fund Board of Trustees v Maladina* (2003) N2486 and the elements that need to be met; established in the case of *Bruce Tsang v Credit Corporation Pty Ltd*.

39. Consequently, I find the application for default judgment under Order 12 Rule 25 (b) and 27 (1) and (2) of the *National Court Rules* or alternatively summary judgment Order 12 Rule 38 of the *National Court Rule* untenable in law and is refused.

40. Each party pays their own costs.

41. With regard to whether or not the State be entitled to be granted leave to file a defence out of time, there was no proper application filed and moved before the court so this court will not make any ruling with regard to that matter.

Orders accordingly.

Pacific Legal Group: *Lawyers for the Plaintiff*
Solicitor General: *Lawyer for the Defendant*