IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of The High Court of Solomon Islands (Faukona J)
COURT FILE NUMBER:	Civil Appeal Case No. 40 of 2019 (On Appeal from High Court Civil Case No. 73 of 2015)
DATE OF HEARING:	25 July 2022
DATE OF JUDGMENT:	12 August 2022
THE COURT:	Goldsbrough P Palmer CJ Hansen JA
PARTIES:	ANTHONY CHEE MING WONG -V- PINNACLE ENTERPRISE LTD
ADVOCATES: APPELLANT: RESPONDENT:	 Taupongi, J Kwaiga, L Banuve, S
KEY WORDS:	CONSENT ORDERS. PARTY NOT PRESENT
EXTEMPORE/RESERVED:	RESERVED
ALLOWED/DISMISSED	Allowed
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JUDGMENT OF THE COURT

1. This is an appeal against the whole of the judgment of Faukona J dated 4 October 2019.

Background

2. We will return to the chronology in due course, but in 2015 a Claim was filed by the First and Second Respondents seeking to rectify the title to two parcels of land situated in Ranadi that were in the name of the Appellant. The initial Defence denied the allegations made in that Claim. The Attorney-General, on behalf of the Commissioner of Lands and the Registrar of Titles, filed a Defence in 2016 also denying the same.

3. In late 2016 the Crown filed an Amended Defence, without the consent of other parties or the leave of the Court, admitting the allegations made in the Claim by the First and Second respondent. Based on that Amended Defence, the First and Second Respondents and the Third respondent signed and filed a Consent Order dated 1 December 2016 granting the relief sought in the Claim. It is important to note that the Judge found that there were no discussions with the Appellant in relation to the Consent Order and it is quite clear that, notwithstanding the Consent Order completely defeated the rights claimed by the Appellant, he took no part in the discussions and processes that led to the Consent Order. There is an inescapable conclusion he was deliberately omitted from that process.

4. The Appellant then filed an Application to Set Aside the Consent Order on 12 January 2017. Relying on the Consent Order, the First and Second Respondents filed an Application for Summary Judgment on 9 February 2017. The parties filed written submissions on those two Applications.

5. In October 2017, the Appellant filed an Application for Leave to Amend his Defence, including a Counterclaim based on new evidence. It is of significance that the Counterclaim makes serious allegations of deceptive behaviour by two identified public officials in the offices of the Commissioner of Lands and the Registrar of Titles.

6. By then it meant that there were three Applications for hearing:

a. the Appellant's Application to Set Aside the Consent Order,

b. the First and Second Respondents' Application for Summary Judgment, and

c. the Appellant's Application for Leave to Amend the Defence and file a Counter Claim.

We note that the Third Respondent supported the Application for the Filing of the Amended Defence including the Counterclaim and the allegations contained in it.

7. A hearing was listed for 29 August 2018 but was vacated because the Judge was ill. On 25 October 2018, the matter was called for mention. At that time, the Appellant was represented by Michael Pitakaka Law Chambers (MPLC) and Mr Suri represented the First and Second Respondents. At that mention, directions were made that the Application to Set Aside the Consent Order would be heard first, and a hearing was fixed for 25 January 2019.

8. On that date there was no appearance for the Appellant, and Mr Kwaiga by then was representing the First and Second respondents. On his oral Application, the Judge dismissed the Appellant's Application to Set Aside the Consent Order for want of prosecution.

9. On 19 March 2019, the Appellant's new counsel filed an Application to Set aside the Order of 25 January 2019, and to reinstate or restore the Application to Set Aside the Consent Order. That matter was heard on 19 July 2019, and the Judge dismissed the same with costs in his ruling. His reasons were dated 4 October 2019.

10. Mr Taupongi filed a sworn statement in support of the 19th of March Application. He recorded that he was employed by MPLC but, at the end of 2018, after discussions with Mr Pitakaka decided to leave that firm and set up his own business. That business was not finally opened until 1 February 2019. In that sworn statement he also sets out a sorry tale of a failure to enter matters in diaries and other administrative flaws; the fact that MPLC was continuing to act for the Appellant, who he had not seen at this stage; and of the agreement he had that Court proceedings would remain with MPLC and only go to him if a proper approach was made, and outstanding fees were paid.

11. Ultimately, the Appellant came to him and, unfortunately, he overlooked filing a notice of change of solicitor for some time. The important point remains, however, and that is MPLC was still acting, and failed to attend, on the 25th of January 2019 when the Application to Set Aside the Consent Order was set aside for want of prosecution.

The decision

12. The Judge reviewed the matters put forward by Mr Taupongi to justify his absence on 25 January, and effectively rejected all of them. He did correctly record that the matter for hearing on 25 January was an Application to Set Aside the Consent Order and that on Mr Kwaiga's Application, in the absence of counsel for the appellant, he dismissed that application. He recognised that what was before him at the July hearing was the Application to Reinstate the Application to Set Aside the Consent Order. However, unfortunately the matter then gets somewhat confused. At paragraph 19 the Judge stated:

On the issue whether the orders of 25th January 2015 were unfair or not, for sure it is procedural and not unfair. Rule 9.13 applies in this situation.

13. We will return to the reference to 9.13, which we think is an error.

14. He then continued:

20. It was the second Defendant's application to set aside the previous default judgment order. Neither the second Defendant attended nor his Counsel with good reasons. So that Court has to dismiss the application by the second Defendant on the ground of want of prosecution.

15. It was not an Application by the now-appellant to set aside a Default Judgment, rather a Consent Order that had been entered into by the other parties, without reference to him. This error, however, is continued in the orders, where it is ordered that the Application to Set Aside the Default Judgment is dismissed.

Discussion

16. We do not intend to canvass the submissions that we have read, and we are grateful to counsel for them. However, it is our view that in the Court below there was a failure by all parties to focus on the real issue, which was the Consent Order made by three of the parties to the litigation that completely defeated the rights that the Appellant asserted before the Court. We have already noted there was a total failure to consult with the Appellant, and he had no knowledge of the Consent Order being entered into. Indeed, it is behaviour that led the same Judge to set aside a consent order in very similar circumstances in the earlier case of *Solomon Import Export Ltd v Onika SIEL* [2018] SBHC 44. We consider such behaviour in the circumstances of this case and *SIEL* to be unethical and contrary to the rules of Court.

17. We noted above the Judge's reference to Rule 9.13, but that can only be prevailed upon by a Defendant in a proceeding, and not by a Claimant. It was irrelevant for the matter in front of the Judge.

18. It is axiomatic, and the Rules require, that the Overriding objectives set out at 1.4 of the Solomon Islands Courts (Civil Procedure) Rules 2007 must be given effect to. These overriding objectives read:

Overriding objective

1.3 The overriding objective of these rules is to enable the courts to deal with cases justly with minimum delay and expense.

1.4 Dealing with cases justly includes, so far as is practicable:

(a) ensuring that all parties address the real issues of the proceedings; and

(b) saving expense; and

(c) dealing with the case in ways that are proportionate:

(i) to the importance of the case; and

(ii) to the complexity of the issues; and

(iii) to the amount of money involved; and

(iv) to the financial position of each party; and

(d) ensuring that the case is dealt with speedily and fairly; and

(e) allocating to each case an appropriate share of the court's resources, while taking into account the need to allocate resources to other cases.

19. Rule 1.8, which reads:

Duties of the parties

1.8 The parties to a proceeding and their representatives must help the court to act in accordance with the overriding objective. They must avoid undue delay, expense and technicality and consider options for primary dispute resolution as early as possible.

imposes a similar obligation and duty on the parties to a proceeding and, of course, their legal representatives.

20. These rules were brought into effect, and the objectives were designed, to case manage the business of the Court to achieve greater efficiencies and reduce expense and, importantly, delay. But it is not only about efficiency, because both Rules 1.3 and 1.4 properly set out that the objective is to enable the Courts to **"justly deal"** with the matters that come before them (our emphasis). The behaviour in this case, in trying to avoid trial of the real issues, has created unnecessary delay, expense and has used up valuable Court time.

21. The Application made by the Appellant is clearly pursuant to Rule 17.55(a):

(a) the order was made in the absence of a party;

22. Quite clearly the Appellant was not present at the hearing on 25 January. While accepting that Mr Taupongi could have managed the matter more effectively and efficiently than occurred in this case, it is not solely his fault that the Appellant was not represented on that day. What is clear is that there is no fault on the part of Appellant personally. It is also to be noted that Mr Taupongi was not solicitor of the record at that stage, and MPLC still was. In any event, having reviewed what occurred here, it falls short of what is set out in Rule 9.13, and the statements of Diplock LJ in *Birkett v James* [1978] AC 297 at 318, even if Rule 9.13 applied. The previous and current counsel for the Appellant could have done better but we accept the explanations put forward by Mr Taupongi were reasonable.

23. In our view they certainly fall well short of the behaviour of the respondents in entering into a consent order that defeated the appellant's rights and excluded the appellant from the process. We note that the learned authors of Halsbury's state:

> *"...a consent order or compromise may be set aside on a ground which would invalidate any other agreement between the parties including mistake, illegality, duress or misrepresentation." Volume 3,4 in Edition, paragraph 521.*

We concur and accept that is what occurred here.

24. We are sure if the Judge had focused more on the fact that the bilateral arrangements made between the Claimants and the Attorney that led to the Consent Order had been at the total exclusion of the Appellant, and completely defeated the rights he was maintaining, he would have reached a different conclusion. This is more especially so when the Amended Pleadings and Counterclaim made it clear that there were serious allegations of impropriety by public officials.

25. As we said before, this was a matter canvassed by this Judge in the *SIEL* decision.

26. We are quite satisfied that in the circumstances of this case the Application to Set Aside the order of 25 January, and the reinstatement of the hearing to Set Aside the Consent Order, should have been made by the Judge. The only matter that exercises us is whether or not the question of whether the Setting Aside of the Consent Order should be returned to the trial Court, or whether it should be dealt to by this Court. We are satisfied given the history of this litigation that we deal with outstanding issues and make the necessary orders to bring it to trial.

27. We are satisfied we should deal with the matter to save time and expense and to give life to the spirit of the objective of the rules, as well as their words. This is a case where the words were noted but the spirit effectively ignored. We can do no better than refer to the *SIEL* decision of this same judge, and what he said at paras 43-47:-

> 43. This ground should be rated as the most fundamental ground of all the grounds rely on to set aside the consent judgment. All other five (5) grounds should hang on this particular ground, if not, others are not necessary at all. R17.55(a) outline the basis upon which a consent order ought to be set aside, because it was made in the absence of other party.
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> 44. The third Defendant as an Applicant need only to show that it was not a party in the negotiations which later materialized in execution of the Consent Judgment. And that the Consent Judgment was made without its knowledge, consent and approval. Secondly, it needs to show that it was not given the opportunity to be heard. Thirdly, it needs to show that the effect of the Consent Judgment had deprivative course on its legitimate rights, and had prejudicial effect on it.
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> 45. From the standpoint of the Claimant after the Consent Judgment was signed, PN: 197-010-262 will be re-registered in the name of the Claimant as the registered owner. That will render the third Defendant losing the land without being heard. Is that justice in the normal sense? Or is it one at two parties dominating and dragging others squeezing their throat off. Conceivably, the rule of natural justice and fairness should apply to all circumstance in a proceeding. One party should not unlawfully benefit on the expense of the other.

46. I have given my opinion in the interpretation of S.21 evidence Act in paragraph (38) above. I have also diligently expressed the benefits and the deprivative effect by the parties in paragraph (34) above. Now it is suffice for me to conclude that the Claimant and the Attorney General who represented the second and the third Defendants had never intended to include the fourth and fifth Defendants to have their consent, or be heard, when the terms of the Consent Judgment was negotiated and concluded.

47. The consent judgment was executed and endorsed on an unprecedented motive to exclude other Defendants. If the other Defendants were given opportunity to be heard there was likelihood they would object to. By agreeing to the Consent Judgment without the fourth and fifth Defendants/Applicant is depriving them; this ground is made out on the balance.

We agree.

28. It is interesting to note that this is at least the second time the State has been involved in Consent Orders that deprived parties to the litigation of their proper right to a hearing. We struggle to understand why the Attorney would be party to such a practice, given the obligations of his high office to be fair and even handed. We are grateful to Mr Banuve who accepted the consent order should never have been agreed to. He also accepted his Amended Defence meant that he admitted the Appellant's claim insofar as it related to damages, and he agreed to discuss that with appellant's counsel.

29. The similarities between *SIEL* and this case are striking. In both cases the Consent Order deprived other parties to their claimed rights to land, and inevitably in both cases led to Applications of the sort before the Court here. That clearly does not fall within the objectives of the rules, or of the obligations on the parties in Rule 1.8. It also gives an appearance that the Attorney is not approaching matters in an even-handed way that one would expect. It follows that the Application to Restore the Setting aside of the Consent Order must be granted. The Consent Order must be set aside. Given the Application for Summary Judgment was totally dependent on the Consent Order it must be dismissed. For completeness the Amendment to Pleadings should be allowed.

Costs

30. We order that the Application to Set Aside the Consent Order is reinstated. The Consent Order is set aside. The 1st and 2nd respondents' Application for Summary

Judgement is dismissed. There will be leave to the appellant to file his amended defence and counter claim within 7 days.

31. Given that there were delays by the appellant's advisers that contributed to what occurred here we consider costs below and, in this court, should be costs in the cause to be taxed if not agreed.

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Goldsbrough (P)

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Palmer (CJ)

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Hansen (JA)