

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 327 OF 2011

BETWEEN : MERCHANT FINANCE INVESTMENT LTD

*Plaintiff*

AND : CENTRAL PLUMBING & BUILDING  
CONTRACTORS LTD

*Defendant*

Counsel : Mr. S. Nandan for the Plaintiff  
Ms. M. Rakai for the Defendant

Date of Hearing : 7<sup>th</sup> February, 2014

Date of Judgment: 16<sup>th</sup> May 2014

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**INTERLOCUTORY JUDGMENT**

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The application before me is to set aside a default judgement and inter alia the petitioner has pleaded for leave to defend this action.

**Plaintiff's Case**

- [1] The defendant is alleged to have taken a loan from the plaintiff. The money had been given after the defendant gave security over property. As the loans are not settled the plaintiff has sold some of the secured property and has filed this case.

### Chronology of Event

- On 24.10.11 the plaintiff filed the Writ of Summons.
- On 15.10.12 the registry has sent a notice under Order 25 Rule 11 asking the parties to appear before the Master on 1.2.13.
- As there was no intention to defend filed, a default judgment had been entered on 31.1.13.
- On 18.3.13 summons filed to set aside the default judgment and seeking leave to file a defence.

### Defendants Affidavit

- [2] As per the affidavit in support of the defendant's summons the managing director states that the plaintiff has filed the writ of summons claiming a sum of \$131, 615. 82. Disputing this amount as a defence the defendant pleads that the defendant has paid a sum of \$262, 400.
- [3] The deponent further deposes that on 18.11.2011 the deponent had a fall and had been admitted to the C.W.M. Hospital. The deponent alleges that as a result the deponent had fractured his hip bone. The deponent had been discharged on 5.12.2011 but had to be taken to India for hip bone replacement surgery.
- [4] While it is not clear as to when the deponent had returned it is deposed that on 23.11.2012 the defendant had been served with an Order 25 Rule 9 notice for striking out the action. The case was to be mentioned before the Master on 1.2.2013. It is further deposed that the deponent had instructed his solicitors to appear on that day but the solicitor had inform that on 30.1.13 a default judgment had been entered.

[5] On 14.3.13 after a period of one and half months, the defendant had filed this application to set aside the default judgment. The deponent pleads that there is no delay in filing this application to set aside the default judgment.

[6] The deponent has annexed the prepared statement of defence and also has taken up a defence of an overpayment of the loan. The managing director of the defendant has also deposed that the plaintiff will not suffer any loss by setting aside the default judgement but the loss the defendant will suffer in the event of default judgment is not set aside would be grave.

### **The Plaintiff's Affidavit**

[7] Plaintiff in his response has deposed that there had been a loan agreement entered between the parties. A bill of sale had been executed over several vehicles of the plaintiff as security. The deponent further deposes that:-

- **Some of the vehicles that had been taken as security had been sold.**
- **Has deposed the transactions of the account.**
- **Pleads that the action had been filed for the balance due on the unpaid loan.**

[8] Answering the affidavit of the defendant, it is deposed that:

- **A medical certificate has not been attached.**
- **The Defendant had failed to file an acknowledgement of service.**
- **There is a delay from the time the default judgment was obtained.**

- The defendant does not have a meritorious defence.
- Plaintiff is suffering a loss due to the non payment of the outstanding sum.

### **The Defendant's Reply.**

- [9] The defendant has given a brief description about the performance of his account and deposed how part payments of the loan was made by selling two of the vehicles that were kept as security.
- [10] The Managing Director has further deposed about the hospitalisation and annexed the letter issued by C.W.M. Hospital.

### **Analysis and Determination**

- [11] Vacating a default judgment is in the absolute discretion of court.
- [12] At this stage I find no material has been placed as to when the writ of summons had been served. The defendant concedes in his submissions that no notice of intention to defend had been filed, due to the hospitalisation of the Managing Director.
- [13] The registry has issued an Order 25 Rule 9 notice to strike out the case on 15.10.12, and informed both parties to be present before the Master on 1.2.13.
- [14] Subsequently, the plaintiff has filed a notice of intention to proceed with a date stamp of 15.11.12. I find the judgment by default has been entered on 30.1.2013.
- [15] This case had not been called before the Master on 1.2.13, pursuant to the notice to strike out as the plaintiff had filed for default judgment on

30.1.13. It appears that the notice to proceed and default judgment had been entered after the notice for striking out was sent.

- [16] While keeping in mind that a default judgment entered irregularly should be set aside. The grounds to set aside a default judgment was discussed in **Eni Khan vs Ameeran Bibi & others [HBC 3/98] March 2003** principles applicable in setting aside a default judgment was discussed with reference to **Burns vs Kendel [1997] 1 Lloyd's Rep S54, Fiji National Provident Fund –vs- Defendant [1998] FJHC 4(1998) 34 FLR 62.**

#### **The test to be applied**

- a) *Is there a prima facie defence or a meritorious defence. **Evan's – vs- Bartlam 1937 ALL ER 646.***
- b) *Does the defendant have a satisfactory explanation for his failure to enter an appearance?*
- c) *That the plaintiff will not suffer irreparable harm if the judgment is set aside.*

#### **Prima facie Defence or a meritorious defence.**

- [17] The defendant has deposed that an overpayment of \$166, 297 has been paid. The amount plaintiff has claimed in the statement of claim is \$131, 615.82 which is less than the purported overpayment.

- [18] In the affidavit in support of the summons the defendant has annexed the purported statement of defence.

[19] The plaintiff has submitted the decided case **Wearsmart Textile Ltd –v- General Machinery Hire Ltd and Other, Civil Appeal No. ABU 0030s of 1997s** where the Court considered the principles laid in **Alpine Bulk Transport Co Inc –v- Saudi Eagle Shipping Co Inc** which discussed the principle of arguable defence.

The court has also considered the subsequent judgment in **Allen –v- Suva City Council –v- Meli Tabu, ABU 0055/2003s.**

[20] The onus is on the defendant to prove that he has a meritorious defence. It has to be a defence, with a probability of success.

**Has the defendant given a satisfactory explanation for his failure to enter an appearance?**

[21] The managing director of the defendant has deposed that on 18 November 2011 the deponent had a fall and fractured his hip bone also the deponent has submitted a letter from the C.W.M. Hospital. The deponent has further deposed that he had to undergo a hip bone replacement surgery in India.

[22] Both counsels has submitted that after filing of the action the Registry has issued an Order 25 Rule 9 notice as the plaintiff had not prosecuted his case. Notice had been sent where parties had to be present before the Master on 1.2.13. As per the case record the dates of notice under order 25 rule 9 is 15.10.12. The case was to be mentioned on 1.02.13. However a default judgment had been entered on 30.1.2013. At this stage it is unclear as to how the default judgment had been entered after the registry had sent an Order 25 notice. As per the submissions the case had never been mentioned on 1.2.13 pursuant to the Order 25 notice to show cause.

[23] The Defendant submits that they had filed the summons to set aside the default judgement on 18.3.2013. This application has been made 1½ months after the default judgment had been entered.

[24] It was submitted that the reason, the defendant had failed to file the notice of intention was because of the managing directors' fall and the events that precipitated from the said fall.

**Will the plaintiff suffer irreparable harm if the judgment is set aside?**

[25] The plaintiff has contended that setting aside the default judgment would cause irreparable harm as the plaintiff will be losing the interest and the delay in recovering the money lent.

[26] The defendant submits that the defendant would suffer more prejudice if the judgment is not set aside as the defendant will not have a fair chance to defend the case.

[27] The plaintiff himself is to be blamed for the delay as the plaintiff had failed to prosecute the action, which resulted in the registry issuing notice under Order 25 Rule 9.

[28] Considering all facts submitted I think that the plaintiff will not suffer on this ground if the default judgment is set aside.

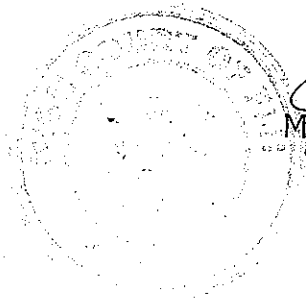
**Conclusion**

[29] As per the submitted case law, for this application to succeed the defendant has to show that there is a meritorious defence. A defence, that has a probability of success.

[30] The defendant has submitted that there is an overpayment of money paid to the plaintiff, in my view the defendant at this stage has to show only a defence that has a high probability of success. I am inclined to hold the defendant has succeeded in this.

[31] I also think that the defendant had sufficiently given an explanation as to why there was a failure to enter an opposition to the statement of defence. As per the facts submitted, I do not think that the plaintiff will suffer any irreparable harm as a result of the default judgment being set aside.

[32] Accordingly the default judgment entered on 30.1.2013 is set aside and case to be mentioned before the Master to take its normal course.



*Mayadunne Corea*

Mayadunne Corea

**JUDGE**

16/5/2014