IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

APPELLATE JURISDICTION

CIVIL ACTION NO: HBC 93 OF 2013

(On appeal from Lautoka High Court of Civil Action No. HBC 93 of 2013)

BETWEEN : **KRISHNA KUMAR NAIDU AND SHILVA NADAN** of Lot 2, Solovi, Nadi and Chinakoti, Moto, Ba, trading as **TROPIKO EXPORTS**.

APPELLANTS

(Original 1st Defendants)

A N D : **KRITESH CHAND** of Lavusa, Nadi, Unemployed.

FIRST RESPONDENT

(Original Plaintiff)

A N D : **SHELVIN RITNESH KUMAR** of Nasau, Nadi, Driver.

SECOND RESPONDENT

(Original 2nd Defendant)

Appearances : Mr Roopesh Singh for appellants

Mr R. Chaudhary for first respondent

Date of Judgment : 17 August 2017

JUDGMENT

INTRODUCTION

[01] This is a timely appeal (after leave being granted to appeal out of time) against the Master's order refusing to set aside the default judgment entered against the appellants. The learned Master ("the Master") by his order dated 13 May 2016, struck out the application filed by the appellants to set aside the default judgment with the costs of $1,000.00. The appellants are now appealing that decision.

BACKGROUND

[02] In order to place the matter in proper context, it is necessary to state the factual matrix to the application in the Court below.

[03] The first respondent, the original plaintiff ("Mr Kritesh Chand") on 27 May 2013 brought a writ action against the appellants, original first defendants ("M/s Krishna Kumar Naidu and Shilva Nadan") claiming among other thing damages for personal injuries he sustained in an accident.

[04] The appellants filed an acknowledgement of service on 27 June 2013. However, they did not file a formal statement of defence but on 1 July 2013 wrote a letter. The first paragraph of the letter states:

"In response to the summons served in regards to the above, we would like to raise the following details in defence to the claim by the Plaintiff."

[05] On 2 August 2013, the respondent entered an interlocutory judgment against appellants on the basis that no statement of defence was filed and served the appellants for damages and costs to be assessed before the Master.

[06] Subsequently, on 9 October 2013, the respondent filed a notice of assessment of damages and interest ("the assessment notice"). The assessment notice was served, with the leave of the court, on the appellants by inserting an advertisement once in the Fiji Sun of 20 February 2014. The advertisement informs that the hearing the assessment notice will be heard on 11 March 2014. The hearing did not proceed on 11 March 2014 as notified. After a few adjournments, the hearing proceeded on 23 April 2015. The Master delivered his ruling on assessment on 10 July 2015. He assessed the damages in the sum of $64,412.40. This order was sealed on 21 July 2015.

[07] On 2 September 2015, the respondent filed a summons seeking leave of the court to execute the judgment entered on 10 July 2015 against the appellants. This summons was served on the appellants (Krishna Kumar Naidu) personally on 2 October 2015.

[08] On 2 November 2015, the appellants filed a summons in conjunction with an affidavit in support seeking orders setting aside the default judgment unconditionally. The appellants also sought unconditional leave to file their statement of defence.

THE RULING OF THE COURT BELOW

[09] The crux of the appellants' case in the Court below was that Order 19 Rule 9 of the High Court Rules 1988 ("HCR") which confer discretion

upon the court, on terms as it thinks just, to set aside or vary any judgment entered in default of pleadings.

[10] When giving his reasons, the Master made the following findings:

> *"These cases relating to default judgments are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party.*
>
> *"This is not a criminal case in which I am called upon to allow my imagination to play upon the facts and find reasonable hypothesis consistent with innocence. A balance of probability is enough. And when the greater probability is that the first named first defendant did not care at all for legal proceedings, why should this court hesitate to find accordingly against the first named first defendant. Thus, as to the explanation of non-appearance is unacceptable.*
>
> *"I reiterate that the three defences raised by the first named first defendant, i.e. the plea of contributory negligence, the plea of volenti non fit injuria and the denial of vicarious liability, have no real prospect of success. They do not carry any degree of conviction. Therefore, the first named first defendant is not entitled to set aside the default judgement on the issue of liability. Thus, the question of prejudice will not arise."*

[11] Based on the above findings, the Master refused to set aside the default judgment entered against the appellants in default of defence and he further ordered the appellants pay costs of $1,000.00 to the respondent in 14 days.

THE GROUNDS OF APPEAL

[12] On appeal before me, the appellants are grinding that the appellants need not establish a defence *per se* but a triable defence, a defence that may be vented at the trial of matter and are raising the following grounds of appeal:

1. *That the Learned Master of the High Court erred in law and in fact in finding that the default judgment sealed on the 2nd August 2013 was regular when in fact the Statement of Defence was lodged with the registry by way of a letter dated the 1st July 2013.*

2. *That the Learned Master of the High Court erred in law and in fact in not setting aside the default judgment entered on 2nd August 2013 when the Appellant/Original 1st Defendant showed by way of affidavit evidence and by the letter dated the 1st of July 2013 that there was a defence on merits which disclosed an arguable or triable issue for trial.*

3. *That the Learned Master of the High Court erred in law and in fact holding that no Statement of Defence had been filed within time, when in fact the Learned Master of the High Court referred to the letter dated the 1st of July 2013.*

4. *That the Learned Master of the High Court erred in law and in fact in finding and holding without any evidence that the Respondent/Original Plaintiff was not liable for contributory negligence.*

5. *The Appellant/Original Plaintiff reserves the right to include or amend the grounds of appeal appearing hereinabove on the receipt of the records of the proceedings before the learned Master of the High Court.*

THE ISSUE

[13] The primary issue before me, as an appellate Court, is whether the Master exercised his discretion in correctly when refusing the application to set aside the default judgment entered against the appellants in default of defence.

THE LAW APPLICABLE

[14] Order 19, rule 9 of the High Court Rules ("HCR") provides as follows:

"9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order (Order 19 deals with default of pleadings)"

THE APPLICATION OF THE LAW TO FACTS

First ground

[15] The first ground of appeal is that the Master erred in law and in fact in finding that the default judgment was regular when in fact the Statement of Defence was lodged with the registry by way of a letter dated 1 July 2013.

[16] The case for the appellant on the first ground is that the respondent could not have entered the default judgment against the appellant in view of the letter sent by the appellant to the Registry as the letter serves as a statement of defence. In contrast, the respondent contends that the default judgment was entered regularly when the appellants failed to serve their statement of defence on the respondent pursuant to HCR, O. 18, r. 2, which provides:

"*Service of defence (O.18, r.2)*

2.-(1) Subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him, whichever is the later.

(2) If a summons under Order 14, rule 1, or under Order 86, rule 1, is served on a defendant before he serves his defence, paragraph (1) shall not have effect in relation to him unless by the order made on the summons he is given leave to defend the action and, in that case, shall have effect as if it required him to serve

his defence within 14 days after the making of the order or within such other period as may be specified therein." (Emphasis provided)

[17] The Master found the letter written by the appellants to the Registry when he draws up his ruling on setting aside application. Admittedly, the letter was not served on the respondent. The appellants had written the letter stating that he had received the writ of summons. It is clear from first paragraph of the letter where the appellants start it by saying: *"In regards to the summons served in regards to the above, we would like to raise the following details in defence to the claims by the plaintiff."*

[18] Having admitted service of the writ of summons in their letter written to the Registry, the appellants in the affidavit filed in support of the setting aside application had denied service. The Master rightfully rejected the appellants' proposition that there was no service of the writ of summons on the appellants.

[19] The writ of summons was served upon the appellant on 30 May 2013. He should have filed an acknowledgement of service by 13 June 2013. O. 12, r.4 of the HCR allowed the appellant to file an acknowledgement within 14 days after service of the writ of summons. He filed it on 27 June 2013, some 14 days after the expiration of the time allowed for the filing of the acknowledgement of service. The appellant had filed his acknowledgement out of time. He thereby had failed to comply with O.12, r.4.

[20] The appellant should have served his statement of defence by 27 June 2013, because the writ of summons was served upon him on 30 May 2013. Instead, the appellant writes a letter on 1 July 2013. The appellant argues that that letter should be regarded as the statement of defence. The letter had been written after the time permitted to file the

statement of defence. In order to file his statement of defence out of time, the appellant ought to have obtained leave of the court to do so. According to O.18, r.2.-(1), a defendant who gives a notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging serving of the writ or after the statement of claim is served on him, whichever is the later. The appellant, in this case, did not serve a statement of defence on the respondent within the time limited for serving a statement of defence as required by O. 18, r. 2.-(1). The appellant's letter to the Registry cannot be regarded as a statement of defence for two reasons. Firstly, it was filed out of time without leave of the court. Secondly, it was never served on the responded. The learned Master correctly disregarded the letter. As there was no statement of defence served on the respondent, the respondent was entitled to enter the default judgment against the appellant. In my opinion, the Master was correct in rejecting the appellant's proposition that the default judgment was entered irregularly. The first ground of appeal fails.

Second ground

[21] The second ground of appeal the appellant had raised is that the Master was incorrect in deciding the grounds of defence offered by the appellant for setting aside the default judgment were not sufficient under the prevalent test to have the default judgment set aside.

[22] The appellant contended that in order to have the default judgment set aside the appellant need not establish a defence *per se* but a triable defence, a defence that may be vented at the trial of the matter.

[23] On the hand, the respondent submits that the appellants do not have a defence at all let alone substantial grounds of defence.

[24] The appellants in their affidavit filed in the court below in support of their application for setting aside the default judgment states:

> *"That with respect to the case, the issue of liability and quantum of damages assessed I believe I have bona fife defence to the action because:*
>
> *i.* *I am aware that the* ***2nd Defendant and the Plaintiff had indulged in alcohol the previous night and into the early hours of the morning of the accident;***
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> *ii.* *I have been informed that the* ***2nd defendant and the plaintiff were intoxicated at the time of the accident;***
>
> ***iii.*** ***Due to the Plaintiff and the 2nd defendant indulging in alcohol and attending parties they were late and were rushing to meet the deadline for loading of cargo at the Air Cargo Terminal;***
>
> *iv.* *The issue of liability and vicarious liability is denied;*
>
> *v.* *The* ***Plaintiff resumed work after 3 months from the date of the injuries,*** *which means I do challenge the quantum of the award. It is also to note that the Plaintiff attended work one day after the accident;*
>
> *vi.* *That in the premise I have a complete defence to the claim and/or* ***there is contributory negligence on the part of***

the Plaintiff *which the Court has not taken into account and these matters must be heard and incorporated into any judgment and award that may eventually be pronounced in this Honourable court.* (Emphasis provided)

[25] I have decided that the default judgment against the appellant had been entered regularly. If the judgment is regular, then it is an almost inflexible rule that there must be an affidavit stating facts showing a defence on the merits.

[26] The Court of Appeal in *Wearsmart Textiles Limited v General Machinery Hire Limited and Shareen Kumar Sharma* (1998) Fiji Court of Appeal 26, ABU 00340U of 1997 said that:

"The general principles upon which a Court should act on an application to set aside a Judgement that has been regularly entered, are set out in the White Book, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143. They are as follows:-

"Regular Judgement – If the judgement is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., ibid. p.129, approving Hopton v Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183, p.363).

[27] In *Pankaj Bamola & Anand Priya Maharaj v Moran Ali* [1992] ABU 59/90 (18 June 1992), Fiji Court of Appeal said:

"Basic preconditions which have to be fulfilled by applicant: i) reason why judgment was allowed to be entered by default, ii) application must be made promptly and without delay, iii) an affidavit deposing to facts that show that the defendant has a defence on the merits."

[28] Undoubtedly, pursuant to O. 19, r. 9 the court has the discretion to set aside a default judgment entered against a party in default of pleadings. This discretion is prescribed in wide terms limited only by the justice of the case.

[29] Fatiaki, J in FNPF v Shiri Dutt (1988) 34 FLR 67 at 69 observed that:

> *"The discretion is prescribed in wide terms limited only by the justice of the case and various 'rules' or 'tests' have been formulated as prudent considerations in the determination of the justice of the case, none have been or can be elevated to the status to the rule of law or condition precedent to the exercise of the courts unfettered discretion. These judicially recognised 'tests' may be conveniently listed as follows: (a) Whether the defendant has a substantial ground of defence to the action; (b) Whether the defendant has a satisfactory explanation for his failure to enter an appearance to the Writ; and (c) Whether the plaintiff will suffer irreparable harm if the judgment is set aside. In this latter regard in my view it is proper for the court to consider any delay on the defendant's part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and whether or not the same has been stayed."*

[30] I apply the above principles to the present case. The appellant in his affidavit, filed in the court below in support of his application to set aside the default judgment, states some facts showing his defence to the respondent's claim. Denying liability including vicarious liability for the injury sustained in the accident, the appellant states that the respondent volunteered to travel in a vehicle driven by the second defendant who was drunk at the time of driving the vehicle. The respondent himself was drunk when travelling with the second defendant. The appellant's affidavit shows that *'2nd defendant and the*

plaintiff were intoxicated at the time of the accident; Due to the Plaintiff and the 2nd defendant indulging in alcohol and attending parties they were late and were rushing to meet the deadline for loading of cargo at the Air Cargo Terminal.'

[31] The facts deposed in the appellant's affidavit raise defences such as *volenti non fit injuria* and contributory negligence.

[32] The master decided that 'the three defences raised by the first named first defendant, i.e. the plea of contributory negligence, the plea of volenti non fit injuria and the denial of vicarious liability, have no real prospect of success. They do not carry any degree of conviction. Therefore, the first named first defendant is not entitled to set aside the default judgment on the issue of liability. Thus, the question of prejudice will not arise.'

[33] The fact that the second defendant was not charged with drunk driving does not preclude the appellant from establishing in a civil proceeding that the second defendant was driving the vehicle which the respondent travelled in after consuming alcohol.

[34] Hon. Justice Gates (as he then was) in *Wasal Khan & 2 Ors v Eparama Turaga & Anor* [2005] HBC344/98L (25 February 2005) held that:

"The discretion is unfettered but must be based on relevant grounds, to avoid injustice. Where defendant counsel deposed that deposed other issues could be resolved without need to file a defence, there is defence of merits carrying conviction, which has reasonable prospect of success, there are issues related to ownership, transfer and third party and no irreparable harm to the plaintiffs to let defendants back into litigation, judgment is set aside, and defence to be filed and served within 7 days."

[35] In *Wearsmart Textiles Limited v General Machinery Hire Limited and Shareen Kumar Sharma* (1998) FCA 26, ABU 0030u of 1997) Fiji Court of Appeal, citing with approval Evans v Bartlam [1937] A.C. at p. 480 HL (per Lord Atkin) stated:

"The principle obviously is that unless and until the Court has pronounced judgment upon merits or by consent, it is to have the power to revoke the expression of its coercive power that has been obtained by failure to follow any of the rules of procedure."

[36] Returning to the matter at hand, the impugned judgment was obtained by failure to follow the High Court Rules in that the appellant failed to serve a defence on the respondent (plaintiff) before the expiration of 14 days after the time limited for acknowledging service of the writ on him. Pursuant to rule 9, the Master had unfettered discretion to set the default judgment aside. In my opinion, the affidavit filed before the Master by the appellant in support of the application to set aside states facts showing reasonable defence to the respondent's claim such as volenti non fit injuria and contributory negligence on the part of the respondent, which has, if proved at the trial, real prospect of success. The supporting affidavit also states facts showing that the respondent's injury was pre-existing. This fact, if proved at the trial, would have real impact on the assessment of damage even if liability were established. There was a defence of merits carrying conviction, which has a reasonable prospect of success. In the circumstances, the Master had failed to exercise his discretion judicially and fairly and was incorrect in not setting aside the default judgment entered against the appellant in default of pleading. I am of opinion that the Master should have set aside the default judgment unconditionally. I would, therefore, set aside the Master's decision refusing to set aside the default judgment. On appeal,

I set aside the default judgment unconditionally, and defence to be filed within 14 days.

Delay

[37] The respondent entered and sealed default judgment on 2 August 2013. Following service of notice of assessment of damages, Assessment of damages was done on 23 April 2015. The Master delivered his ruling on assessment of damages on 10 July 2015, and the ruling was sealed on 21 July 2015. On 2 November 2015, the appellant issued summons to set aside the default judgment unconditionally.

[38] The Fiji Court of Appeal, in *Woodstock Homes (Fiji) Ltd v Sashi Kant Rajesh* [2008] ABU 81/06 (apf HBC 394/99L (18 April 2008), said:

> "Notwithstanding proposed defence had merit, Judge was entitled to refuse application to set aside because of unexplained delay, but failed to consider whether the delay for which the appellant was responsible resulted in prejudice which respondent suffered. Appeal allowed."

[39] The Master did not consider prejudice that would be caused to the respondent, for he had decided that the proposed defence has no real prospect of success. He held that the question of prejudice will not arise.

[40] The Master was not only incorrect in deciding that the defence has no real prospect of success but also in deciding that the question of prejudice will not arise.

[41] What is important in a setting aside application is to exercise the discretion based relevant grounds to avoid injustice. There is a defence of merits with a real prospect of success. I find that there no irreparable harm to let appellant back into litigation.

CONCLUSION

[42] For these reasons, I hold that the Master was in correct in refusing to set aside the default judgment entered against the appellant on 2 August 2013. Accordingly, I set aside the Master's ruling dated 13 May 2016 that struck out the appellant's application to set aside the default judgment. I grant unconditional leave to the appellant to file and serve defence within 14 days. I would make no order as to costs.

Final Outcome

1. Master's order set aside.
2. Appellant is granted unconditional leave to file and serve defence within 14 days.
3. No order as to costs.

Hajhsagmeer
.....17/8/17.....

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

17 August 2017

Solicitors:

For appellants: M/s Patel & Sharma, Barristers & Solicitors

For respondent: M/s Chaudhary & Associates, Solicitors