

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 60 of 2015

BETWEEN : **WAKAYA LIMITED** a limited liability company registered under the Laws of Fiji and having its registered office at Ground Floor, Civic House, Suva.

PLAINTIFF/RESPONDENT

AND : **TRADE AIR ENGINEERING LIMITED** a limited liability company registered under the Laws of Fiji and having its registered office at c/Jay Lal & Co. Chartered Accountant, 21 Tui Street, Marine Drive, P O Box 343, Lautoka.

DEFENDANT/APPLICANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Karl Jamnadas -for the Plaintiff
Mr. M. Raratabu -for the Defendant

Date of Ruling : 14th May, 2018

RULING

[Summons seeking Setting Aside of Default Judgment by the Defendant pursuant to Order 19 Rule 9 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court]

A. INTRODUCTION

1. The Defendant filed the Summons on 24th March, 2015 and sought for the following orders-
 - (a) That the Judgment in Default entered against the Defendant in this action on 05th March, 2015 by the Plaintiff and all proceedings be set aside unconditionally;
 - (b) That the Defendant be at liberty to file Statement of Defence unconditionally; AND
 - (c) That the costs of the Application be costs in the cause.

2. This **Summons** was filed together with an **Affidavit in Support** deposed by the **Company Director, Sarita Devi Sharma Singh** in this proceeding.
3. The Application was made pursuant to *Order 18 Rule 18 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court* instead of *Order 19 Rule 9 of the High Court Rules, 1988*.
4. The application was opposed by the Plaintiff and an affidavit in opposition was filed.
5. Both counsels representing the parties to this proceeding filed their written submissions and accordingly argued their respective cases.

B. BACKGROUND FACTS

6. The Plaintiff filed and commenced a Writ action against the Defendant on 22nd January, 2015.
7. The Defendant failed in its bid to file and serve his **Acknowledgment of Service** and the **Statement of Defence** which subsequently resulted in the Plaintiff successfully obtaining a **Default Judgment** pursuant to *Order 19 Rule 6 of the High Court Rules, 1988* against the Defendant.
8. The Default Judgment was sealed and served on the Defendant on 09th March, 2015.
9. On 13th March, 2015, the Defendant's Solicitors filed the Notice of Appointment of Solicitors and subsequently on 24th March, 2015 filed the **Summons to set aside the Default Judgment**.
10. Hence, the application for setting Aside the Default Judgment for determination.

C. PRINCIPLES ON SETTING ASIDE A DEFAULT JUDGMENT

11. *Order 19 Rule 9 of the High Court Rule, 1988 deals with Setting Aside Judgment and states 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.

12. Under **Or.19 R.9** the Court may set aside or vary 'any judgment' unconditionally or on terms.
13. The Court has a very wide discretion in an application of this nature but it is also guided by certain well known principles.

One of the principles is that:

"Unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure". (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473).

14. The basic principles applicable to setting aside judgments in the exercise of Court's discretion are set out in *Halsburys Laws of England Vol 37 4th Ed. para 403*, inter alia, thus:

"In the case of a regular judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits ... For this purpose it is enough to show that there is an arguable case or a triable issue"

15. It is further stated therein:

"There is no rigid rule requiring the applicant to explain why he allowed judgment to go by default, but nevertheless, at least in the case of a regular judgment, such explanation is obviously desirable to enable the court to exercise its discretion, especially as to any and if so what terms should be imposed".

16. A useful summary of the factors to be taken into consideration in setting aside is to be found under *Notes to Or.19 r.9 of The Supreme Court Practice 1995 Vol 1* at 142 which inter alia states as follows:

"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred."

It goes on to further state as follows:-:

*"The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.*, *The Saudi Eagle* [1986] 2 Lloyd's Rep. 221, C.A., at p. 223, where the earlier cases are summarised. From that case the following propositions may be derived:*

- (a) *It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.*
- (b) *If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."*
17. Also on the subject of **setting aside default judgment**, in *Davies v Pagett (1986) 10 FCR 226* at 232 a Full Court of the Federal Court of Australia said:-

"The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party

upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation. The problem of delays in the courts, egregious as it is, must be dealt with in other ways; for example, by disciplinary actions against offending practitioners and by a comprehensive system of directions, hearings or other pre-trial procedures which enable the court to supervise progress - and, more pertinently non-progress - in all actions'.

18. *Eni Khan v. Ameeran Bibi & Ors* (HBC 3/98S, 27 March 2003), His Lordship Justice Gates set out the principles applicable to **setting aside default judgment**, referring to *Burns v. Kondel* [1971] 1 Lloyd's Rep 554; *Evans v. Bartlam* [1937] AC 473; *Vann v. Awford* (1986) LS Gaz 1725; The Times LR (23 April 1986); and *Fiji National Provident Fund v Datt* [1988] FJHC 4; (1988) 34 FLR 67 (22 July 1988). So, too, His Lordship Justice Pathik in *South Pacific Recordings Ltd v. Ismail* [1994] FJHC 134; Hbc0597j.93s (30 September 1994) and also in *Pravin Gold Industries Ltd v. The New India Assurance Company Ltd* [2003] FJHC 298; HBC0250d.2002s (4 February 2003), referring to *Pankaj Bamola & Anor v. Moran Ali* (FCA 59/90), amongst others. In *Kaur v. Singh* [2008] FJHC 158; Appeal Case 61 of 2008 (5 August 2008) the authorities were also explored.
19. *Wearsmart Textiles Ltd v. General Machinery Hire Ltd* [1998] FJHC 26; Abu0030u.97s (29 May 1998) the Court of Appeal similarly addressed the question of **setting aside judgment**, by reference to the authorities including *Farden v. Richter* (1889) 23 QBD 124; *Hopton v. Robertson* [1884] WN 77, reprinted 23 QBD 126n; *Richardson v. Howell* (1883) 8 TLR 445; *Watt v. Barnett* (1878) 3 QBD 183; *Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1886] 2 Lloyd's Rep 331 (CA); and *Vann v. Awford* (1986) 83 LS Gaz 1725; The Times LR (23 April 1986).

CONSIDERATION OF THE APPLICATION

20. The Plaintiffs substantive claim is alleging **Breach of Contract** of 12th July, 2007 and **Tort of Negligence** against the Defendant.
21. On 28th January, 2015 the Defendant was served with the Writ of Summons and the Statement of Claim and failed to file and serve the Acknowledgment of Service and the Defence as was required of him in terms of **Order 18 Rule 18(2) of the High Court Rules, 1988**. As a result, **Default Judgment** was entered against the Defendant on 05th March, 2015.
22. Currently before this court is the **Summons** filed and served by the **Defendant** seeking orders to **set aside the Default Judgment** entered on 05th March, 2015 and **all proceedings be set aside unconditionally AND** That the **Defendant** be at liberty to file the **Statement of Defence** unconditionally together with **costs** of this application be costs in the cause.
23. I note that this application is filed pursuant to **Order 18 Rule 18 of the High Court Rules, 1988** which deals with the **Striking Out** provision and therefore is filed under the incorrect provision of the Rules. The correct provision would have been **Order 19 Rule 9** since the Default Judgment was entered in **default of pleadings, since no statement of defence was filed**. In any event, this court will exercise its discretionary power to regularise the same in terms of **Order 2 of the High**

Court Rules, 1988 and determine the application in terms of Order 19 Rule 9 of the High Court Rules, 1988 accordingly.

24. It cannot be denied by both parties to this proceeding and it is my view that the **Judgment in Default of Defence** entered against the Defendant for the sum of \$341, 994. 99 on 05th March, 2015 is a **regular judgment**.
25. The leading authority on an application **setting aside the default judgments** is the old English decision *Evans v Bartlam [1937] AC 473*. The primary and secondary considerations described in that decision have been approved and adopted in Fiji by the Court of Appeal in several decisions including *The Fiji Sugar Corporation Limited v Mohammed Ismail* [1988] 34 Fiji LR 75; *Wearsmart Textiles Limited v General Machinery Hire Limited* and *Shareen Kumar Sharma* (unreported), Fiji Court of Appeal, Civil Appeal No. ABUO030 of 1997, a decision dated the 29th of May, 1998 (their honours Sir Moti Tikaram, President; the right Honourable Sir Maurice Casey, and the Honourable Justice J.D. Dillon presiding) and more recently *Suva City Council v Meli Tabu* (unreported), Fiji Court of Appeal, Civil Appeal No. ABUO055 of 2003 delivered on the 16th of July, 2004. (Their honours Eichelbaum, Penlington and Scott).

The principles are:

- (a) As a primary consideration there must be before the court an affidavit from the defendant or associated person properly deposing and demonstrating a meritorious defence.
- (b) As secondary consideration the affidavits and submissions must advance adequate reasons as to why the judgment was allowed to be entered by default.
- (c) The affidavit and submissions must confirm that a substantive application was made promptly or explain with adequate reasons why there was a delay in making the application.
- (d) The plaintiff should depose and submit in reply as to any prejudice or irreparable harm that will be suffered if judgment is set aside.
26. The exercise of the discretion is wide and unfettered as until the Court has pronounced judgment upon the merits or by consent it must have the power to revoke a default judgment obtained by a failure to follow any of the rules of procedure (*Evans supra*). Any defence described in the affidavits supported by the submissions must have a real prospect of success and carry a degree of conviction allowing the court to form a provisional view of the probable outcome of the action.
27. This requires the court to scrutinize the defendant's affidavit to see whether it contains deposed facts which will support a meritorious defence that is one with a reasonable chance of success (*Wearsmart Textiles (supra)*, *Suva City Council (supra)* and *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd's Reports 221).

Why was Default Judgment allowed to be entered?

28. The Writ was issued by the Plaintiff on 22nd January, 2015 and the Defendant was served on 28th January, 2015.

29. In terms of Order 18 Rule 18(2), the Defendant should have filed his Statement of Defence no later than 25th February, 2016, and failed to do so. The Defendant even failed to file and serve the acknowledgment of service showing his intention to contest the proceedings.
30. On 04th March, 2015, the Plaintiff filed the Judgment by Default pursuant to **Order 19 Rule 9** and succeeded in obtaining the Default Judgment signed and sealed by the Chief Registrar on 05th August, 2016.
31. The **Defendants** explanation is as follows-
- That if the documents were received by the Defendant then an acknowledgment of Service and the Defence would have been filed. Therefore service is denied.
 - That the Defendant was under the impression that the Plaintiff was to furnish further and better particulars in respect of the unsigned report it relied on to send the demand letter to allege its claim. Neither the Plaintiff nor its Solicitors have replied to date.
32. The **Defendant** ought to have known better herein that the front page of the Writ of Summons he was served with clearly stated what the Defendant was required to do and on his failure to act accordingly would result in the Plaintiff proceeding with the action and obtaining Judgment against the Defendant without any further notice.
33. **Alternatively**, the Defendant could have sought the assistance of the High Court Civil Registry and enquired what was required to be done and/or when is the Defendant supposed to appear before the Court or should he seek the legal representation in the matter. Instead he thought fit and proper to sit back and stay silent on the Plaintiff's claim and not even file and serve an acknowledgment of service and stayed away from the court proceedings. The Defendant should have followed the proceedings and filed his Defence and kept a tab on proceedings until its final disposition only if he was interested in defending this action to the extreme. The Defendant failed in his bid to carry out the necessities and only woke up when the Plaintiff issued and served the sealed order for the **Judgment by Default** on 09th March, 2015 this then prompted the Defendant to engage the legal representation and counter the same by filing a Summons seeking to set aside the Default Judgment entered against him accordingly.
34. I do not find the Defendant's explanation **satisfactory** and therefore is **unacceptable** as to what led to the entering of the Default Judgment against the Defendant by the Plaintiff.

Delay in filing Setting Aside Default Judgment?

35. Default Judgment was entered on 04th March, 2015 and sealed on 05th March, 2015. The Defendant filed his Summons seeking the setting Aside of Default Judgment on 24th March, 2015, almost **3 weeks** later.
36. If the **Defendant** had kept a tab on the proceedings and liaised with the High Court Civil Registry, he would not have faced this uphill battle of Setting Aside the Default Judgment. The Defendant must also remember that the initial Summons seeking the order for setting aside of the Default Judgment was struck out for non-appearance and then had to apply for the re-instatement that was eventually consented to by the Plaintiff's Counsel.

37. If it had not been for the service of the **Plaintiff's Judgment By Default** on the **Defendant** on 09th **March, 2015** that the Defendant would not have come to know that Default Judgment had already been entered against the Defendant.
38. I do not find that the **Defendant** has **delayed** rather was **prompt** in filing his application seeking for the Setting Aside of this default judgment entered against him on 05th March, 2015.

Meritorious Defence?

39. The proposed Defence of the Defendant has been marked and annexed as "**SS6**" to the Affidavit in Support deposited by Sarita Devi Sharma Singh, Director of the Defendant Company and in summary-
- "The Defendant stated that the Plaintiff by its Solicitors Letter of Demand dated 27th June, 2014, made a demand for the sum of \$341,994.99. The Defendant had denied owing the Plaintiff in its reply dated 07th August, 2014. Neither the Defendant nor its Solicitors received any reply thereafter.*
- The Defendant further denies owing the Plaintiff any sum at all as the Plaintiff's claim is made after the warranty period had expired....."*
40. I reiterate that the Judgment by Default entered in absence of Defendant's Defence simply means that the Default Judgment was entered for the liquidated claim of \$341,994.99 and that **liability** has been **established** by the Plaintiff for the **General Damages**. The onus of proving the **Damages** as sought for in the substantive claim remains with the Plaintiff to formally proof at the hearing of the **Assessment of Damages, which is yet to be filed and served as per the requirement of the Rule.**
41. Reference is now made to the Case of *Fiji Sugar Corporation Limited (supra), Dhan Kaur v Karam Singh & Others*, Lautoka High Court Civil Action No. 223 of 1993 an unreported decision of his Honour Justice Lyons wherein he said-"*When a Defendant makes an application to set aside judgment, the onus is on him to put before the court evidence in proper form by way of an affidavit as to the factual elements of a meritorious Defence*".
42. Bearing in mind these circumstances in my view require judgment to be accordingly set aside (*Beale v Macgregor, 2 T.L.R. 311*). Although the judgment was regular but not on merits, there is an affidavit of merits i.e. an affidavit stating facts showing a substantial ground of defence [*Farden v Richter (1889), 23 Q.B.D. 124*].
43. On facts showing a defence the following statement of **Lord Denning M.R.** in *Burns v Kondel (1971) 1 Lloyd's Rep. 554 at 555* is apt:
- "We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue."*
44. Upon a careful perusal of the **Draft Defence, Affidavit in Support, written and oral arguments together** with the above rational, I find that the **Defendant** has explained in his Affidavit in Support and the **Draft Defence** as to what had transpired between the Plaintiff and the Defendant in terms of the Contract entered into on 12th July, 2007 and hence has shown an arguable case

before this Court. The *contents of the material within the Draft defence* justifies that leave ought to be granted to the Defendant to defend and put his Defence to court accordingly.

45. I further find that there are **triable issues** and/or **arguable Defence** that would have some **prospect of success** at trial and/or even **mitigate** the Plaintiff's claim. It must also be taken into consideration that the decision to enter Judgment by Default against the Defendant was not made on **merits** rather made on **the Defendant failing to file and serve the pleadings**.

Will the Plaintiff suffer any Prejudice or irreparable harm on setting Aside Order?

46. The Substantive action was commenced on 22nd January, 2015

Service of the Writ was effected on the Defendant on 28th January, 2015.

On 04th March, 2015, search for the Statement of Defence was made.

Accordingly, on 05th March, 2015, Judgment by Default was entered against the Defendant.

47. To date, the Plaintiff's Default Judgment sealed on the liquidated claim remains pending and unenforced in terms of the execution to recover the liquidated judgment sum of \$341,994.99 and is further delayed since the current summons seeking an order for setting Aside of Default Judgment was filed and proceeded with by the Defendant which is now awaiting the Ruling of this court.
48. According to the Plaintiff he will be Prejudiced if the setting aside of Default Judgment is allowed since the Default Judgment was entered regularly and that further the matter is delayed, then obviously more expenses will be suffered.
49. The Plaintiff should not be prejudiced in any way bearing in mind when the matter was commenced and for what length of time it has been pending for Court's determination. Upon any decision reached on the current setting aside of the default judgment order, the Plaintiff will definitely be entitled to any costs incurred unnecessarily.

IN CONCLUSION:

50. For the aforesaid Rational, I accede to the **Defendant's** Summons seeking an order to **set Aside the Default Judgment** entered **regularly** against him on 05th March, 2015. The Default Judgment is accordingly set aside and the Defendant is granted the leave to defend the action.
51. **The Defendant** is hereby directed to file and serve his **Statement of Defence** in 14 days timeframe and the **Plaintiff** is granted 14 days thereafter (at liberty) to file and serve any **Reply to Defence**.
52. The matter needs to be expedited and both Counsels representing the parties to this proceedings must ensure to follow a strict timetable set by the court and wind up the pleadings and the cause of action within a reasonable timeframe.
53. Accordingly, the Plaintiff is entitled to **costs** summarily assessed at **\$1,000** to be paid by the Defendant within 14 days.

54. I impose an **unless order** in place and if the Defendant fails to either file and serve his Statement of Defence within in 14 days and fails to pay the Plaintiff the ordered costs of \$1,000 within the same 14 days will result in the **Status Quo** of the Default Judgment sealed on 05th March, 2015 to remain intact and the Plaintiff at liberty to proceed further as he wishes to do so in terms of his remainder of the claim by filing a summons for assessment of damages accordingly.

FINAL ORDERS

- (i) The Defendants Summons seeking the setting aside of the Default Judgment entered against the Defendant hereby Succeeds.
- (ii) The Defendant to file and serve his Statement of Defence within the next 14 days.
- (iii) The Plaintiff is at liberty to file and serve a Reply to the Defence 14 days thereafter.
- (iv) The Defendant is ordered to pay costs summarily assessed at \$1000 to the Plaintiff within the next 14 days.
- (v) Unless order is imposed in place for the "Defendant" to comply with the court orders; file and serve Statement of Defence and pay the costs of \$1,000 within 14 days timeframe and upon failure will result in the activation of the unless order accordingly.
- (vi) The parties must ensure to file all pleadings and wind up the cause of action expeditiously.
- (vii) Orders accordingly.

Dated at Suva this 14th May, 2018



cc: Jamnadas & Associates, Suva
Siddiq Koya Lawyers, Nadi

A handwritten signature in black ink, appearing to be "VISHWA DATT SHARMA", written over a horizontal dotted line.

Master
VISHWA DATT SHARMA