THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 177 OF 2016

BETWEEN : **LARRY SIMON** Businessman and semi-retired pilot formerly of Namaka Nadi and 353 Strathford BLVD Strathmore, Alberta Canada TIP 154 and now of 9A Maplewood Green, Strathmore Alberta, Canada, TIP 1G7.

PLAINTIFF

A N D : **PACIFIC ISLAND AIR LIMITED** a limited liability company incorporated under the Companies Act of Fiji whose registered office is London Avenue Namaka Nadi.

1st DEFENDANT

A N D : **JOHN SCOTT CURRIE** company director and businessman c/- Pacific Island Air Limited of London Avenue of Namaka Nadi

2nd DEFENDANT

Appearance : **Mr. Isireli Fa for the plaintiff**
Mr. Peter Knight for the defendants

Hearing : **Thursday, 05th November 2020 at 9.00 a.m.**

Decision : **Friday, 22nd January 2021 at 9.00 a.m.**

D E C I S I O N

[A] INTRODUCTION

(01) Before me is the defendants' summons seeking the grant of the following orders;

(01) for an order that the judgment by default filed on 09th July 2020 and served on Crompton's on 17.07.2020, be set aside, and

(02) for an order that the defence and counter claim which were struck by the honourable court on 26th June 2020, be reinstated and that the action be permitted to proceed to trial; and

(03) for an order that there be a stay of execution or enforcement of the default judgment until the delivery of judgment on this summons.

(02) The application is opposed by the plaintiff

(03) The parties have filed three (03) affidavits for consideration. They are:

(A) The affidavit of (Ms) Carroll Sela, a solicitor employed by Cromptons, solicitors for the first and second defendants, in support, sworn on 24.07.2020.

(B) The affidavit of Mr. Larry Simon, the plaintiff, in opposition sworn on 21.09.2020.

(C) The affidavit of Mr. Tuni James Beddoes, the General Manager of the first defendant, in reply, sworn on 22.10.2020.

(B) BACKGROUND

(01) The plaintiff, Larry Simon, has instituted two proceedings in the High Court of Lautoka, namely Lautoka High Court Action No: HBC 177 of 2016 claiming US$134,003.00 and Action No: HBC 182 of 2018 claiming US$600,000.00 both based on alleged breach of an agreement dated 28.12.2012, entered between the first defendant, Pacific Island Air Limited as vendor, the second defendant John Scott Currie, as purchaser and the plaintiff as guarantor.

(02) The vendor, the first defendant, operates an aviation company in the Republic of Fiji. The vendor has agreed to sell and the purchaser, the second defendant has agreed to purchase the assets and the business of the aviation for a consideration of US$1,600,000.00. The plaintiff was the Chief Executive Officer and the Director of the first defendant Company.

(03) Pursuant to clause 2.1 of the agreement, the purchase price was to be apportioned as follows:

(a) $ [300,000.00] for the Goodwill including the intellectual property;

(b) $ [40,000.00] for the Plant and Equipment (which sum is apportioned and appropriated between each constituent item of the Plant and Equipment in Schedule 6 according to the respective valued assigned thereto);

(c) $ [300,000.00] for Stock/Aircraft Spares & Parts

(d) $ [960,000.00] for the other assets (Aircraft, Motor Vehicle, Hanger, Office & Components) or adjusted down by $420,000.00 if insurance payment is received as per clause 8.1 for the damaged float plane.

(04) Pursuant to clause 2.2 of the agreement, the purchase price to be paid by the 2nd defendant to the plaintiff is to be paid as follows:

(a) *US $100,000, on signing by both parties. The deposit is only refundable to the Purchaser if Settlement Conditions A are NOT met.*

(b) *US $900,000, on 31st January 2013 at which time the shareholding is to be transferred to the purchaser and once settlement conditions (A) are completed to the satisfaction of the Purchaser.*

(c) *US $600,000 within 12 months or earlier by mutual agreement of both parties and conditions (b) are met to the satisfaction of the Purchaser.*

(05) Pursuant to clause 4.1 of the agreement, the completion date of the agreement was the 31st of January 2013 by which time all the shares in the 1st defendant were to be transferred to the purchaser.

(06) Pursuant to clause 4.2 of the agreement, completion of the agreement was subject to the following conditions:

(a) *An approval certificate from Fiji Investment Board pursuant to the Foreign Investment Act (Fiji) in respect of the transaction under this Agreement and the granting to the Purchaser of the rights from the appropriate government agencies all those Licenses currently held by the Vendor in the carrying on of the Business in each case on terms no less favorable than those currently enjoyed by the vendor ("Approval");*

(b) *The issue of new License to the Purchaser in place of the ones presently held by the Vendor ("New Licenses").*

(07) That the plaintiff had caused the 1st defendant to comply with clause 4.2 of the agreement.

(08) That the plaintiff had on the 8th of January 2013 caused all the shares in the 1st defendant to be transferred to the 2nd defendant.

(09) That the 2nd defendant has paid the plaintiff the sum of USD $100,000.00 (One Hundred Thousand Dollars) upon the signing of the agreement pursuant to clause 2.2 (a) of the agreement and the sum of USD $900,000.00 [Nine Hundred Thousand Dollars] pursuant to clause 2.2 (b) of the agreement

(10) That the 2nd defendant upon signing of the agreement on occurrence of events in paragraph 14, 15 and 16 above took control of the 1st defendant by becoming a Director of the 1st defendant and appointing other Directors to it.

(11) The plaintiff alleges that the 2nd defendant, upon the plaintiff complying with the conditions of the agreement and upon the 2nd defendant taking control and possession on the 1st defendant, refused and neglected to pay the plaintiff the final installment of USD $600,000.00 (Six Hundred Thousand Dollars) due to the plaintiff under the agreement.

(12) By a letter dated 10th of July 2014, the plaintiff in accordance with clause 2.2 [c] of the agreement, required the 2nd defendant to pay the balance sum of USD $600,000.00 [Six Hundred Thousand Dollars] due and payable to the plaintiff from the sale of assets, business and shares of the 1st defendant as the plaintiff had performed all it was required to do under the agreement. Annexure "B" is a true copy of the letter of the 10th of July 2014.

(13) The plaintiff alleges that the 2nd defendant is in breach of the agreement by its failure to pay the plaintiff the balance of the purchase price of USD $600,000.00 [Six Hundred Thousand Dollars] due and owing to the plaintiff under the agreement.

(14) The plaintiff further alleges that by reason of the 2nd defendant's breach, the 2nd defendant is now in possession of and ownership of the 1st defendant's business and assets without making full payment to the plaintiff pursuant to the agreement.

(C) HISTORY

(01) The pleadings in this action rest with an amended statement of defence and counter claim on behalf of the second defendant filed on 03.06.2019 and a reply to the amended defence and counter claim filed on 30.07.2019.

(02) The last activity in this matter was a decision by this court delivered on 12.06.2020 dismissing an application by the plaintiff for summary judgment heard on 26.11.2019.

(03) In this action, no summons for directions has been filed by the plaintiff, there has been no discovery of documents and there has been no pre-trial conference.

(04) On 12.06.2020, the matter was called for mention before me. At the mention, the plaintiff and defendants were represented by legal counsel and the following directions were given:

"Mention on 19.06.2020 at 9.00 am to fix a Trial date."

(05) On 19.06.20, the matter was called for mention before me again. The plaintiff was represented by Fa & Company's city agent and the defendants were not present. The Court made the following directions:

"Mention on 26.06.2020 to allow the Defendants to appear to fix a Trial date."

(06) On 26.06.20 the matter was called for Mention before me. The plaintiff was represented by Fa & Company's city agent and no appearance was made by the defendants. The following directions were made:

> *"As the defendants were not present in Court for the second time, the Defendants Statement of Defence and Counterclaim is struck out and the Plaintiff may enter a default judgment for the liquidated claim".*

(07) As a result of the defendants' second consecutive non-appearance and the directions made on 26.06.20, the plaintiff proceeded to seal the said Orders of the Court on 30.06.20, which was filed and served on the defendants Solicitors. The Orders of the Court were as follows:

> *"1. That the 1st Defendant's Statement of Defence and Counterclaim dated 19th September 2018 and the 2nd Defendant's Amended Statement of Defence and Counterclaim filed 3rd June 2019 is hereby struck out due to the second consecutive non-appearance by the Defendants.*
>
> *2. That the plaintiff to enter Default Judgment under Order 19 r.3 for his liquidated claim."*

(08) Following this, the plaintiff entered judgment by default against the defendants which was sealed and filed on 09.07.20 and served on the defendants solicitors on 17.07.20. The judgment by default reads as follows:

> *"The first defendant's statement of defence and counterclaim dated 19 September 2018 and the second defendant's amended statement of defence and counterclaim dated 29 April 2019 and filed herein on 3 June 2019 having been struck out on 26 June 2020, due to second consecutive non - appearance by the defendants;*
>
> *IT IS THIS DAY ADJUDGED that there be judgment in favour of the plaintiff in the sum of USD$600,000.00 with damages, interest and costs to be assessed by the Court."*

(09) The defendants now seek to set aside the default judgment mentioned in paragraph (8) above.

(D) THE LAW

(01) An application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action has never been heard on the merits.

(02) A defendant against whom judgment in default has been entered may apply for it to be set aside under Order 13, rule 10 or under Order 19, rule 9 of the High Court Rules. In situations where the defendant has failed to file in the first instance, notice of intention to defend, then order 13 procedure is the correct process.

(03) Order 19 is applicable only where, after notice of intention to defend is filed, no statement of defence had followed.

❖ THE PRINCIPLES OF SETTING ASIDE DEFAULT JUDGMENTS

(01) A default judgment can be obtained regularly or irregularly and both of these forms of judgments can be set aside.

(02) However, there is a distinction between setting aside a default judgment for irregularity and setting aside a judgment which was in fact regular.

(03) Fry L J in **Alaby –v- Praetorious [1888] 20 QBD 764** at 769 succinctly drew the distinction as follows:-

> *"There is a strong distinction between setting aside a default judgment for irregularity in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular has been obtained through some slip or error on the part of the Defendant in which case the court has a discretion to impose terms as a condition of granting the Defendant relief."*
>
> (Emphasis added).

(04) This principle was adopted and applied by the Fiji Court of Appeal in **"Subodh Kumar Mishra v Rent-a-car"** (1985) 31 FLR 52. Thus, where an irregular default judgment is entered (for example time for acknowledging service or for serving a defence had not expired by the time the default judgment was entered) which irregularity cannot be cured, the defendant is entitled as of right to have the judgment set aside.

(05) However, where the default judgment had been entered regularly, the Court has a wide discretion and neither Order 13, rule 10 nor Order 19, rule 9 of the High Court Rules impose any restriction in the manner in which the discretion is to be exercised.

(06) The rationale for the unconditional discretion that allows the court to intervene is explained by Lord Atkin in **"Evans v Bartlam"**, 1937 DC 473 as follows;

> *"The Principle obviously 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."*

(07) Lord Atkins pronouncement was endorsed and followed by the Fiji Court of Appeal in **The Fiji Sugar Corporation v Mohammed Ismail** FLR Vol. 34, p75.

(08) The principles applicable for analysis of the merit of an application to set aside a default judgment are well known and settled. The leading authority is **Evans –v- Bartlam** [1937] 2 All E.R. 646. The following passage from the judgment of Lord Atkin in **"Evans v Bartlam"** is pertinent in the subject of principles on which a court acts where it is sought to set aside a regular default judgment;

> *"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.....The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

(09) The principles of that case have been widely adopted in Fiji, and by the Fiji Court of Appeal in **Pankanji Bamola & Anor. –v- Moran Ali** Civil Appeal No. 50/90 and **Wearsmart Textiles Limited –v- General Machinery Hire & Anor** Civil Appeal No. ABU0030/97S.

(10) In **"Pankaj Bamola & Anor v Moran Ali"** (supra) the Court of Appeal held;

> *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.*

(11) In **Russell v Cox 1983 NZLR 654, McCarthy J** held;

> *"In approaching an application to set aside a judgment which complies with the rule, the Court is not limited in the considerations to which it may have regard, but three have long been considered of dominant importance. They are;*

1. That the defendant has a substantial ground of defence;
2.That the delay is reasonably explained;
3. That the plaintiff will not suffer irreparable injury if the judgment is set aside.

(12) A useful summary of the factors to be taken into consideration is to be found under notes to Or. 13 r9/14 of **THE SUPREME COURT PRACTICE 1995** Vol. I at p.142 and which is, inter alia, 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 has no defence, and because, 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.*

(13) Therefore the judicially recognized "Tests" may be conveniently listed as follows;

(a) Whether the defendant has a substantial ground of defence to the claim.

(b) Whether the defendant has a satisfactory explanation for the default judgment.

(c) The promptness with which the application is made.

(d) Whether the setting aside would cause prejudice to the plaintiff.

(E) CONSIDERATION AND DETERMINATION

(01) The real issue and the only issue which this court has to consider at the outset is **whether the default judgment was regularly entered.** Thus, where an irregular default judgment is entered (for example time for acknowledging service or for serving a defence had not expired by the time the default judgment was entered) which irregularity cannot be cured, the defendants are entitled as of right to have the judgment set aside.

However, where the default judgment had been entered regularly, the High Court has a wide discretion and neither Order 13, rule 10 nor Order 19, rule 9 of the High Court Rules impose any restriction in the manner in which the discretion is to be exercised.

(02) In the affidavit in reply, Mr. Tuni James Anthony Beddoes, the General Manger of the first defendant says that the default judgment was irregularly entered. Mr. Beddoes in paragraph (9) of the affidavit questioned the legality of the striking out order as follows;

> 9. *With regard to paragraph 11 thereof, it is not admitted that the Default Judgment was entered into regularly, repeat paragraph 8 above and say that the Default Judgment was issued because the defence and Counterclaim filed by the Defendants was struck out with no application to strike out the defence and Counterclaim being filed and because there is no provision in the High Court Rules for striking out a defence and counterclaim without an application for the striking out being filed.*

(03) In my view, it is not open to the defendants to challenge the Court's striking out order in these proceedings for setting aside the default judgment.

(04) The court struck out the statement of defence and the counter claim under its inherent jurisdiction due to the second consecutive non- appearance by the defendants. (See history under part "c" above)

(05) Following this, the plaintiff entered judgment by default **in default of pleadings.** There is no instance of irregularity at all. **I conclude that the default judgment had been entered regularly.**

(06) It is true, that the striking out of the defence and counter claim was in respect of default of appearance. **But it is critical to note that the default judgment was entered in default of pleadings.** In the summons filed on 28.07.2020, the defendants are primarily seeking the following orders;

> ***01. For an order that the judgment by default filed on 09th July 2020 and served on Cromptons on 17th July 2020 be set aside; and***
>
> *02. For an order that the Defence and Counterclaim which were struck out by the Honorable court on 26th June 2020, be reinstated and that the action be permitted to proceed to trial.*
>
> [Emphasis added]

Therefore, it is clear to me that the defendants are primarily seeking an order to set aside the judgment by default and consequently seeking an order to reinstate the statement of defence and the counter claim. The defendants are not entitled to be heard in support of their application for reinstatement of the statement of defence and the counter-claim, unless and until they take the first and essential step towards setting aside the default judgment which had been entered regularly.

Therefore, what is required is an affidavit stating facts, showing that the defendants have a defence on the merits.

(07) In **Ghim Li Apparel Fiji Ltd v Daumaka Garments Ltd**[1] the High Court cited Halsbury's Laws of England Vol 37, 4th ed, which notes what the party seeking to set aside default judgment must prove. It reads:

> *"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 of a triable issue.*

(08) The High Court cited **Supreme Court Practice 1999 Volume 1 page 157** which reads:

> *"Regular Judgment - If the Judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating the facts showing a defence on the merits F v Ritcher (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 Huddlestone, B., ibi. P.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. 126 n.; and see Richardson v Howell (1883) 8 T.L.R. 445; and Walt v. Barnett (1878) 3 Q.B.D. 183 at 363).*
>
> *For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see Alpine Bulk Transport Co. Inc. V. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, CA, and note 13/9/18, "Discretionary powers of the Court", below.*
>
> *On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reason given by him for the delay in making the application even if the application given by him is false (Vann v. Awford (1986) 83 L.S.Gaz. 1725; (1986) The Times, April 23, CA). The facts that he has told lie in seeking to explain the delay, however may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion (see para. 13/9/18, below)*

(09) The affidavit of (Ms) Caroll Sela, sworn on 24.07.2020 is completely silent on what the defendants defence is. Therefore, the defendants cannot invoke the courts discretion to set aside the default judgment which had been entered regularly.

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[1] **Ghim Li Apparel (Fiji) Ltd v Daumaka Garments Ltd [2013] FJHC 325.**

ORDERS

(01) The application to set aside the default judgment is declined.

(02) I formally dismiss the summons filed on 28.07.2020.

(03) There will be no order as to costs.

.....22/01/2021.....
Jude Nanayakkara
[Judge]

High Court - Lautoka
Friday, 22nd January 2021