

**IN THE HIGH COURT OF FIJI**  
**CIVIL JURISDICTION**  
**AT LABASA**

HBC 01 of 2019

**BETWEEN** : TAIYAB ALI

**PLAINTIFF**

**AND** : SALADOKA SERU CAKABOU aka RATU SALADOKA  
SERU CAKABOU

**1<sup>ST</sup> DEFENDANT**

**AND** : ORANGE COAST INVESTMENT LIMITED

**2<sup>ND</sup> DEFENDANT**

**BEFORE** : M. Javed Mansoor, J

**COUNSEL** : Mr. A. Kohli for the plaintiff  
Mr. K. Maisamoa for the first defendant

**Date of Hearing** : 23 October 2020

**Date of Decision** : 31 August 2022

# DECISION

PRACTICE & PROCEDURE

*Default judgment – Factors to be considered – Service of judgment – Orders 13, 19, 37 (1) 1, 42 (8) & 45 (10) of the High Court Rules 1988*

The following cases are referred to in this decision:

- a. *Pravin Gold Industries Ltd v the New India Assurance Company Ltd* [2003] FJHC 298; HBC0250d.2002s (4 February 2003)
  - b. *Taiyab Ali v Saladoka Seru Cakabou aka Ratu Saladoka Seru Cakabou* [2020] FJHC 83; HBC 01.2019 (14 February 2019)
  - c. *Evans v Bartlam* [1937] AC 473
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1. On 24 December 2016, Saladoka Seru Cakabou, the first defendant, was travelling with family members from Savusavu to Vusa, when the vehicle he was driving collided with another vehicle at Doladola point in Natewa. The vehicle driven by the first defendant – bearing number LR 1323 – belonged to the second defendant, a vehicle renting firm. The first defendant had taken the vehicle on hire. The collision was with a vehicle belonging to the plaintiff bearing number LH 1040. The plaintiff's vehicle was driven by his son.
2. The plaintiff filed action against both defendants to recover special and general damages. The plaintiff alleged that the first defendant caused the collision through his negligent driving of the vehicle. The second defendant was made a party based on vicarious liability. Writ and statement of claim were served on both defendants.
3. The first defendant did not acknowledge service of the writ and statement of claim within the time stipulated by the rules. The second defendant filed a defence and denied vicarious liability, saying that the first defendant was neither its agent nor servant, as the vehicle was released to him on hire.
4. An interlocutory judgment was entered against the first defendant on 6 May 2019. Judgment by default was sealed on the same day. The first defendant was ordered to pay the plaintiff a sum of \$54,310.00 as special damages. General damages was to be assessed. Trial proceeded against the second defendant.

5. When trial was taken up, court observed that the plaintiff had not proceeded to assess judgment after notice to the first defendant in terms of Order 37 rule 1 (1). Therefore, the judge proceeded with the trial in terms of Order 35 rule 1 (2). In doing so, the court disregarded the interlocutory judgment (paragraph 26 of the judgment dated 14 February 2020). The court was of the view that where an interlocutory judgment has been entered, the plaintiff is required to comply with Orders 42 rule 8 and 37 rule 1 (1).
6. Order 42 rule 8 says the party entering judgment must serve a copy of the sealed judgment on every other party not later than 14 days after entry of judgment. Order 37 rule 1 (1) says where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, damages would be assessed by the registrar, and the party entitled to the benefit of the judgment may proceed after giving at least seven days of notice on the party against whom the judgment is given. Written submissions in reply filed on behalf of the first defendant in support of the current application highlighted the plaintiff's failure to comply with these rules.
7. The case was heard on 20 January 2020 under Order 35 rule 1. In his judgment given on 14 February 2020, Amaratunga, J struck off the action against the second defendant<sup>1</sup>. This was on the basis the vehicle was hired to the first defendant. A hiring arrangement, the court held, would not ordinarily establish vicarious liability. The court made a finding of negligence against the first defendant. The plaintiff was awarded damages for losses sustained in a sum of \$51,000.00. The court did not make reference to general damages. The first defendant was ordered to pay the plaintiff \$3,000.00 as costs.
8. The first defendant, filed summons on 11 August 2020 supported by an affidavit seeking the following orders:
  - (i) "The judgment in default of defence entered on 6 May 2019 be wholly set aside unconditionally.
  - (ii) The execution of the default judgment entered against the 1<sup>st</sup> defendant be stayed pending the determination of this application.

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<sup>1</sup> [2020] FJHC 83; HBC 01.2019 (14 February 2019)

- (iii) That leave be granted to the 1<sup>st</sup> defendant to file its acknowledgement of service and the statement of defence.
- (iv) Any other orders that this court deem just and equitable”.

The application was made under Order 19 rule 9 and Order 45 rule 10 of the High Court Rules 1988.

9. In his affidavit in support of the application to set aside the interlocutory judgment, Mr. Cakabou said he hired a vehicle from the second defendant for the use of his family during Christmas 2016. On 24 December 2016, he was transporting family members from Savusavu to Vusa village along the Natewa corridor. His affidavit gave details of the collision. His position is that the driver of the vehicle LH 1040 caused the collision through his fast and negligent driving near Colocol estate. The other vehicle was driven from the opposite direction and collided with the car he was driving. The collision injured his left knee. He said the driver of the other vehicle smelt of liquor. He and the other driver, he said, left their vehicles at the scene of the accident.
10. Mr. Cakabou said he was served a writ together with a statement of claim when he attended court while he was serving a prison term. The writ was issued out of the registry on 25 January 2019. The affidavit of service says Mr. Cakabou was served outside the court room in Labasa on 31 January 2019. He did not file an acknowledgement of service. Interlocutory judgment was given on 6 May 2019.
11. The first defendant attributes his failure to file an acknowledgement of service to imprisonment at the time he was served with the writ. He said he could not engage a lawyer as a phone could not be used within the prison. When he next appeared in court on 4 April 2020, he was served with the default judgment. This happened when he came from prison to attend his criminal case at the Labasa Magistrate Court. Straight after that, he says, he was taken back to prison. A relative had taken the default judgment and assured him of representation in court.
12. The plaintiff opposed the first defendant’s application. The plaintiff in his answering affidavit said that prison authorities allow lawyers to visit the prison,

and that prisoners are allowed to write letters to court. He said that the deponent's father's cousin was a lawyer and could have made an application to set aside the default judgment. He averred that the lawyer who represented him on 4 April 2020 should have made an application to set aside the default judgment. The plaintiff said that his son, who drove his vehicle, does not consume liquor. He said that the first defendant ran away from the scene leaving the vehicle behind.

13. In an answering affidavit, the first defendant stated that his present lawyer could not file an application to set aside the default judgment because he did not fully instruct him. After he was released from prison he gave instructions to file an application to set aside default judgment. He said that the plaintiff cannot rely on his caution interview because it is not the original copy or a certified true copy. For the same reason, he said, the statements given by the plaintiff's son and by Eroni Camela could not be relied upon. Eroni Camela was a passenger in the first defendant's vehicle. He denied that he ran away from the scene of the accident.
14. In his answering affidavit, the first defendant alleged that the counsel he instructed to file a lawsuit against the driver of the vehicle that caused him injury by driving negligently on 24 December 2016, had appeared for the plaintiff in court. The first defendant averred that he has a meritorious defense. He said that he would be prejudiced if the default judgment is not vacated and an opportunity given to present his side of the story.
15. The allegations made by the first defendant against the plaintiff's counsel were not stated in the affidavit filed in support of his application to vacate the interlocutory judgment. No explanation is given for this omission. Moreover, there exists a mechanism to report the breach of a lawyer's professional obligations. The court has not been made aware whether possible steps concerning those allegations have been taken through the available mechanism. I have disregarded the first defendant's averments on this matter in his affidavit in reply.
16. In assessing the first defendant's application, a useful point to start is by considering whether the delay on his part to move court is reasonable.

17. The record reveals that a file search was carried out on behalf of the first defendant on 26 May 2020. The application for search was by the first defendant's solicitors, Mysamoa & Associates. By the time the search was carried, court had already entered judgment on 14 February 2020.
18. Summons to set aside interlocutory judgment was filed on 11 August 2020. The first defendant's affidavit in support says nothing about why he did not take any steps for about two and a half months after the file search was carried out. The first defendant does not say in his supporting affidavit when he went to prison or when he was released. This is also not stated in his affidavit in reply. He says that default judgment was handed to him on 4 April 2020. He says a relative had taken his default judgment and said that he would be represented. The defendant's affidavit does not state what steps he took to pursue the matter through his relative or by other means. There is no evidence as to the measures he took while in prison to meet lawyers or to give instructions to defend the action. His affidavit gives very little relevant detail concerning his personal circumstances and inability to respond to the writ.
19. In my view, the matters adduced by the first defendant's affidavit are not sufficient to constitute a satisfactory explanation for default. The authorities, however, say that the court has to look beyond his explanation in deciding whether or not to set aside a judgment entered following default. Even a reasonable explanation of default is not essential for the court to exercise its discretion. But the court will take into consideration the reason for allowing a judgment to be entered and then applying for it to be set aside.
20. In *Pravin Gold Industries Ltd v the New India Assurance Company Ltd*<sup>2</sup>, the High Court said:

'... to enable the court to properly exercise its discretion there are certain basic preconditions which have to be fulfilled by the applicant. There are: (i) reasons why judgment was allowed to be entered by default, (ii) application must be made promptly and without delay, and (iii) an affidavit deposing to facts that show that the defendant has a defence on the merits''.

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<sup>2</sup> [2003] FJHC 298; HBC0250d.2002s (4 February 2003)

21. The Supreme Court Practice states:

“The discretionary power to set aside a default judgment which has been entered regularly is unconditional, and the court should not lay down rigid rules which deprive it of jurisdiction. 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 commonsense, since there is no point in setting aside a judgment if the defendant can [not] show merits, [but if they are shown] 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 commonsense the court will take into account the explanation of the defendant as to how the default occurred”<sup>3</sup>.

22. The court must, therefore, consider the merits of the first defendant’s defence<sup>4</sup>.

23. In his judgment dated 14 February 2020, the judge awarded the plaintiff damages in a sum of \$51,000.00 payable by the first defendant. The court’s judgment was preceded by a hearing on 20 January 2020, at which evidence was given on behalf of the plaintiff and the second defendant. On behalf of the plaintiff, his son, who drove the vehicle at the time of the collision, the police officer who visited the scene of the accident and the plaintiff gave evidence.

24. The plaintiff gave evidence of the damage to his vehicle. The plaintiff’s son, Imran Ali, said that he stopped the vehicle LH 1040 and took it to a side, when he saw the other vehicle being driven dangerously. The witness was cross examined by the second defendant. The judge accepted the witness’s evidence.

25. The manager of the second defendant said that the vehicle belonging to the second defendant was rented out to the first defendant. He said that the first defendant did not report the accident to the company.

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<sup>3</sup> [1995] Vol.1 at 142

<sup>4</sup> Evans v Bartlam [1937] AC 473

26. The judgment makes reference to the evidence of the police officer who arrived at the scene after the accident. He told court that the first defendant was unruly and uncontrollable. He said that the defendant left the scene without making a statement. The court accepted his evidence. The exhibits in the record include photographs at the scene of the accident, a sketch drawn by the police officer that visited the scene of the collision, repair bills, the first defendant's record of interview, statement of Imran Ali, police statement and police report. The Savusavu police station officer issued a report dated 18 January 2017 stating that CPL 3458 Tupeni visited the accident scene. The report stated that the driver of the vehicle LR 1323 – the first defendant – could not be located and interviewed under caution for the offence of careless driving.
27. The court's finding was that the first defendant drove vehicle bearing registration number LR 1323 at an excessive speed and negligently, when it collided with the plaintiff's vehicle. The court also said that collision occurred after the plaintiff's son stopped his vehicle.
28. The court observed that the plaintiff's vehicle was severely damaged. The plaintiff produced payment receipts for repairs amounting to \$19,650.00. Payment for towing charges in a sum of \$950.00 was established. There was evidence before court that the vehicle had substantially depreciated in value as a result of the accident. The value of depreciation was placed at \$16,000.00. The court computed the loss of income from hiring at \$14,400.00 over a period of six months at the rate of \$80.00. On this basis, the court awarded the plaintiff special damages in a sum of 51,000.00. The sum awarded was based on the evidence given on behalf of the plaintiff. This was less than the sum of \$54,310.00 special damages awarded by the interlocutory judgment of 6 May 2019. Evidence in regard to these matters were admitted by the judge, without taking into consideration the interlocutory judgment.
29. Upon a consideration of the matters placed before court by the first defendant's affidavits, the evidence led on behalf of the plaintiff and the second defendant, and the contents of the judgment dated 14 February 2020, the first defendant does not seem to have a reasonable prospect of success on the merits.



30. Another matter to be considered is whether the first defendant's application to set aside the interlocutory judgment is misconceived in the particular circumstances.
31. The first defendant has asked that the interlocutory judgment given on 6 May 2019 be set aside. He has also asked for a stay of execution of the interlocutory judgment until the determination of this application. The first defendant does not say whether he has appealed the judgment of the High Court entered on 14 February 2020. The plaintiff submitted that even if default judgment is set aside, the judgment of the High Court will remain in force.
32. Judgment was sealed on 2 June 2020. The applicant's summons was filed on 11 August 2008, long after hearing on 20 January 2020 and judgment on 14 February 2020. By then, the period for appealing had passed. In appeal, the defendant could have canvassed the correctness of the interlocutory judgment as well as the judgment of the High Court.
33. A judgment cannot be entered without proof of service of the writ<sup>5</sup>. Order 13 deals with failure to give notice of intention to defend. Order 13 rule 2 provides for an interlocutory judgment to be entered on a claim for unliquidated damages, if a defendant fails to give notice of intention to defend. Order 13 rule 10 states that without prejudice to rule 8 (3) and (4), the court may, on such terms as it thinks just, set aside or vary any judgment. The defendant's application is under Order 19 rule 9 and Order 45 rule 10.
34. Order 19 rule 9 says that the court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of Order 19. Order 19 deals with default of pleadings. Order 45 says that a party against whom a judgment has been given or an order made may apply to the court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just.

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<sup>5</sup> Order 13 rule 8

35. The first defendant's application dated 11 August 2020 is for stay of execution in respect of the interlocutory judgment entered on 6 May 2019. There is no application for stay of execution of the judgment dated 14 February 2020.
36. The first defendant is likely to have been aware that judgment was entered on 14 February 2020, at the time the application to vacate the interlocutory judgment was filed. The search carried out on behalf of the first defendant on 26 May 2020 would have revealed this fact. When the hearing was held on 20 January 2020, the judge made it clear that he would disregard the interlocutory judgment (paragraph 26 of the judgment). It can be said that the interlocutory judgment has no bearing on the findings made at the hearing. Findings of liability were on the basis of the oral and documentary evidence before court. The hearing went beyond the exercise of assessing damages. Any relief granted in respect of the interlocutory judgment in this case will be no more than of academic value.
37. For the foregoing reasons, the first defendant's summons is struck off.

**ORDER**

- A. The first defendant's summons filed on 11 August 2020 is struck off.
- B. The parties will bear their own costs.

Delivered at Suva this 31<sup>st</sup> day of August, 2022



M. Javed Mansoor  
Judge