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

**CIVIL ACTION NO.: HBC 353 of 2020**

**BETWEEN : ANN STEELE**

**PLAINTIFF**

**AND : TUPOU DRAUNIDALO**

**DEFENDANT**

---

**APPEARANCES/REPRESENTATION**

| | | |
|---|---|---|
| **PLAINTIFF** | : | Mr. D. Toganivalu [Toganivalu Legal] |
| **DEFENDANT** | : | Appearing In Person |
| **RULING BY** | : | Acting Master Ms Vandhana Lal |
| **DELIVERED ON** | : | **20 January 2023** |

---

## RULING

---

1. On 22nd February 2021 a default judgment was sealed against the Defendant in default of filing of a defence.

2. The Defence now seeks orders to have the said judgment set aside and has made an application pursuant to section 3, 4 and 5 of the Arbitration Act and Orders 2 (2); 19 and 32 of the High Court Rules.

3. According to the Defendant, upon receipt of the writ in December 2020, she had filed acknowledgment of service on 11th December 2020 challenging the jurisdiction of the court due to arbitration clause in the agreement.

Furthermore, according to the Defendant, the land subject to the agreement is located at Western division and performance is to take place there; hence the writ should have been filed in the Western division.

According to the Defendant, she received the default judgment on 05th October 2021.

The default judgment is irregular due to mix claims by the Plaintiff. According to the Defendant, the Plaintiff cannot enter default judgment but submit the claim for hearing.

And since there is an exclusive arbitration clause, this court lacks jurisdiction to hear the matter.

**4.** In her claim, the Plaintiff seeks return of $60,000 paid to the Defendant.

She further alleges to be subject to financial loss, stress and delay. She also claims to be embarrassed and humiliated.

In her prayer she claims:

- Judgment for $60,000;
- Accounts as to monies paid by Plaintiff;
- General Damages for loss and suffering.

**5.** The claim by the Plaintiff is not a liquidated claim.

**6.** As far as the issued raised by the Defendant regarding the Arbitration clause in the novated agreement, my findings are as follows.

**7.** In **South Pacific Fertilizer Limited v Allied Harvest International PTC Limited, a Lautoka High Court Civil Action HBC 142 of 2017** (delivered on 11 September 2017) there was an application made by the Defendant to stay legal proceedings.

Tuilevuka J. when deciding on issue of whether to stay or not to stay the proceedings cited Hoffman J. in Premium Naffa Products Limited and others v Fiji Shipping Co Limited and others. [2007] UKHL 40 who at paragraph, 13 and 14 opined that, "*where an arbitration agreement exists the starting point for its interpretation should be the assumption that unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction, all disputes between the parties should be referred to arbitration*".

His Lordship further cited Bundesgerichtshof's decision of 27th February 1970 (1990) Arbitration International, Vol 6 No. 1 p79:

> "*There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising there from; irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals*".

**8.** The Plaintiff submits that the novated agreement is not in force as it lapsed after 9 month pursuant to clause 6.1 of the agreement.

**9.** The Defendant argues that it is due to the breaches by Plaintiff that she could not perform within the 09 months.

**10.** Clause 4 deals with the termination of the agreement which was to be in writing.

**11.** Clause 6 talks about the duration of the agreement.

**12.** Clause 5 of the said novated agreement speaks of disputes settlement.

**13.** The issue regarding whether the agreement had lapsed or not should be settled pursuant to clause 5 of the agreement as both parties had expressly agreed that all disputes and differences between the parties arising in the course of the dealing are to be settled by parties through arbitration and have nominated the arbitrator.

**14.** In **Sheetal Investments Limited v Australia and New Zealand Banking Group Limited a Suva High Court Civil Action HBC 227 of 2010** (delivered on 13th May 2011), the Defendant made an application for striking out of the Plaintiff's claim. Application was made pursuant to Order 18 rule 18 (d) read with Section 5 of the Arbitration Act.

There was a lease agreement between the parties and a clause in the agreement required parties to settle all disputes or differences arising out of the agreement by arbitration.

The court had to decide whether the agreement prevented the court hearing the case in view of Scott v Arey [1843 – 60] ALL E.R. 1.

**15.** Hettiarachchi J. made following finding on the issue:

- *Order 12 rule 7 of the High Court rules outlines provision for procedure to dispute jurisdiction of the court;*

- *The term submission in Arbitration Act is defined written agreement to submit present or future differences to arbitration;*

- *Section 5 of Arbitration Act makes provision allowing a party to apply for stay of proceedings at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings;*

- *Case Authorities are clear that a party intending to object to the jurisdiction must not have delivered any pleadings or taken any other steps in the proceedings. By serving pleadings or taken any other steps in the proceedings a party submits to the jurisdiction of the court in respect of the claim and will not thereafter be able to obtain a stay.*

- *Section 5 of the Arbitration Act requires an application to stay the proceedings to be filed that is a summon ought to be filed pursuant to Order 12 rule 7 of the Rules after filing of an acknowledgment of service.*

**16.** Pursuant to Order 12 Rule 7 of the High Court Rules the Defendant challenging jurisdiction "*shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence apply to the Court.*"

**17.** In the current proceedings after filing the acknowledgment of service, the Defendant has failed to make any application pursuant to Order 12 Rule 7 of the High Court Rules challenging the jurisdiction of the court within 14 days of acknowledging service. Neither did she then apply for a stay under Section 5 of the Arbitration Act.

**18.** Section 12 rule 7 (6) reads:

"*Except where the Defendant makes application in accordance with paragraph (1), the acknowledgement by a Defendant of service of a writ shall, unless the acknowledgement is withdrawn by leave of the court under Order 21 Rule 1 be treated as a submission by the Defendant to the jurisdiction of the court in the proceedings*".

**19.** The only application the Defendant has made is the current application to set aside default judgment and in this application she is asking for stay.

**20.** The Defendant in her affidavit in support blames COVID 19 restrictions as reason for not making the necessary application.

**21.** However, I take note of the following:

- *The writ was served on 09th December 2020;*
- *An acknowledgment of service was filed on 11th December 2020;*
- *The default judgment was entered in February 2021;*

- *The COVID 19 restriction and lockdown began towards end of April 2021.*

**22.** The Defendant has not provided this court with sufficient reasons why no application was made for stay within time prescribed under Order 12 Rule 7 of the High Court Rules or between December 2020 and April 2021. She had short of 05 months to apply.

**23.** Neither do I find the Defendant has satisfied the requirement for setting aside the default judgment hence her application fails.

**24.** The Default Judgment should have been an interlocutory judgment and hence is amended to read as:

*Interlocutory Judgment*

*No statement of defence having been filed by the Defendant, it is this day adjourned that interlocutory judgment be entered against the Defendant as follows:*

*a. Judgment for $60,000;*

*b. Damages to be assessed;*

*c. Defendant to provide account for all monies paid by the Plaintiff to the Defendant.*

**Orders**

**25.** The application made by the Defendant dated 14 October 2021 is dismissed.

**26.** The default judgment sealed on 22 February 2021 is amended to read as follows:

*Interlocutory Judgment*

*No statement of defence having been filed by the Defendant, it is this day adjourned that interlocutory judgment be entered against the Defendant as follows:*

*a. Judgment for $60,000;*

*b. Damages to be assessed;*

c. *Defendant to provide account for all monies paid by the Plaintiff to the Defendant.*

**27.** The Defendant shall pay the Plaintiff cost of this application which is summarily assessed at $850 and this cost is to be paid within 14 days from 20 January 2023.

.....
**Vandhana Lal [Ms]**
**Acting Master**
**At Suva.**

**20 January 2023**

**TO:**

1. **Suva High Court Civil Action No. HBC 353 of 2020;**
2. **Toganivalu Legal,** Solicitors for the Plaintiff;
3. **Tupou Draunidalo,** the named Defendant appearing in person.