

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 196 of 2018

BETWEEN : **SPECIALIST WHOLESALERS PTY LIMITED T/A**
BEARING WHOLESALERS a duly registered company and
having its place of business at Cnr Barry Street, & Holloway
Drive, Bayswater Victoria, Australia.

Plaintiff

AND : **LAUTOKA BEARING SERVICES LIMITED** a duly registered
company under the laws of Fiji and having its registered office and
its principal place of business at 55 Vitogo Parade, Lautoka, Fiji.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. N. Kumar for the Plaintiff
Ms. S. Begum for the Defendant

Date of Ruling : 05th March 2024

RULING

01. The defendant-company by an ex- parte motion, supported by an affidavit sworn by its director, moved the court for the following orders:

- a. That, the default judgment entered on 23 December, 2018 be wholly set aside;
- b. That, a permanent/interim stay granted on the Writ of Fieri Facias until the final hearing of this motion;
- c. That, the writ of summons be struck out as an abuse of process;
- d. The cost of this action; and
- e. Any other orders this court may seem just and equitable.

02. The brief background of this case is that, the plaintiff and the defendant companies (hereinafter referred to as **the plaintiff** and **the defendant** respectively) are in same business of distributing automotive bearings in Australia and Fiji respectively. The plaintiff alleged that, it sold and delivered goods to the defendant to the value of AU \$ 37,343.86 and the defendant refused and or neglected to pay despite the request. The plaintiff commenced the proceedings against the defendant in the Magistrate's Court, Melbourne, Victoria and obtained a default judgment against the defendant.
03. The plaintiff was unable to enforce the said judgment in Fiji and commenced the current proceedings in this court. The defendant failed to acknowledge the writ and the plaintiff entered the default judgment for the total amount. The plaintiff then tried to enforce this monetary judgment against the defendant by way of Writ of Fieri Facias. The defendant then filed the current Motion and sought the orders therein.
04. The court, upon hearing the counsel for the defendant, stayed the execution till determination of the current motion. The parties then filed their respective affidavits and agreed to dispose this matter by way of written submission. Accordingly, the solicitors for both parties filed their legal submission with the relevant authorities. Even though the defendant company sought several orders in the current motion, main argument of the parties was only on the question of setting aside the default judgment.
05. The default judgment in this matter was entered for failure to give notice of intention to defend pursuant to Order 13 of the High Court Rules. The court has discretion to vary or set aside any judgment entered in pursuance of this Order, on such terms as it thinks just (see: Or. 13 r. 10).
06. There is number of decisions which set out the principles of setting aside any judgment entered for the default of a party. Fatiaki J (as he then was) in **Fiji National Provident Fund v. Datt** [1988] 34 FLR 67 held at page 69 that;

“The discretion is prescribed in wide terms limited only by the justice of the case and although various "rules" or "tests" have been formulated as prudent considerations in the determination of the justice of a case, none have been or can be elevated to the status of a 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”.

07. It is stated both in the statement of claim and the affidavit opposing the Motion to set aside the judgment that, the plaintiff commenced the proceeding in Australia and obtained the default judgment against the defendant. Accordingly, the plaintiff's claim was decided by the default judgment entered in the Magistrate's Court in Australia.
08. In Fiji there are two pieces of legislations, which provide for a statutory scheme for recognition and enforcement of judgments of foreign countries, with which reciprocal arrangements have been made. They are; (1) **Reciprocal Enforcement of judgments Act 1922 (Cap 39)** and **Foreign Judgments (Reciprocal Enforcement) Act 1935 (Cap 40)**. The first one was brought to facilitate the reciprocal enforcement of judgments and awards in United Kingdom and Fiji with the power of the president to extend it to the judgments of any other country or territory of the Commonwealth outside the United Kingdom.
09. The second one was enacted with the purpose of making provisions for the enforcement, in Fiji, of judgments given in foreign countries which accord reciprocal treatment to judgments given in Fiji. Under this latter Act, the president has power to extend its application to the judgments given in other countries and some other commonwealth countries which are not included in the former Act (Cap 39). The procedure to be followed in enforcing those judgments was explained by Byrnes J. in **Clement James v Joseph Stewart** High Court Suva: Civil Action No 190/1989: (13 October 1989) and the same was followed by many cases thereafter (*See: **Rays Haulage Pty Ltd v. Khan** [2013] FJHC 207; HBC89.2011 (30 April 2013) and **Balsundram v. Sundram** [2017] FJHC 257; HBM02.2016 (31 March 2017).*
10. However, no reason is adduced in the affidavit filed on behalf of the plaintiff for not enforcing in Fiji, the judgment obtained in Australia despite clear procedure is set out in the legislations as stated above. The affidavit merely states that, the plaintiff could not enforce it.

11. Furthermore, the deponent of the affidavit filed on behalf of the plaintiff annexed a copy of “Final Demand Notice” dated 11.07.2018 and sent by the solicitors for the plaintiff. It is marked as “PK1”. The letter is addressed to the defendant and states that, there was a default judgment against the defendant entered in the Magistrate’s Court of Victoria at Ringwood for the amount claimed in this case. The solicitors for the plaintiff stated in the first three paragraphs of said letter (PK1) as follow:
1. We act for **Burson Automotive Pty Ltd T/A Bearing Wholesalers** through the agency of Macquarie Collections (Vic) Pty Ltd.
 2. We are instructed that you are indebted to our client in the sum of AU\$ 37,143.86 for goods sold and delivered to you during the period of January 2017 – February 2017, particulars of which are well to you.
 3. Despite a default judgment entered against you in the Magistrate’s Court of Victoria at Ringwood, demands for payment from our client and their Australian Solicitors, you neglect or refuse to make any payment towards this debt. (Emphasis is mine).
12. It is obvious from the above paragraphs that, the defendant owed the said amount to **Burson Automotive Pty Ltd T/A Bearing Wholesalers**. It is **Burson Automotive Pty Ltd T/A Bearing Wholesalers** which obtained the default judgment against the defendant in Australia. The demand was made by the solicitors for the plaintiff on behalf of **Burson Automotive Pty Ltd T/A Bearing Wholesalers**. However, the plaintiff in this case is **Specialist Wholesalers Pty Limited T/A Bearing wholesalers**, and not **Burson Automotive Pty Ltd T/A Bearing Wholesalers** which demanded the said amount from the defendant through Exhibit “PK1”.
13. The exhibit “PK1” tendered by the plaintiff company itself indicates that the alleged amount is owed by the Defendant to **Burson Automotive Pty Ltd T/A Bearing Wholesalers**. This could be the reason for not enforcing in Fiji, the judgment obtained in Australia against the defendant. This raises a serious doubt as whether the defendant owed the alleged amount to **Burson Automotive Pty Ltd T/A Bearing Wholesalers** or the plaintiff company in this case. In this circumstances, the default judgment entered by the plaintiff cannot be allowed to stand in this case against the defendant. The impugned default judgment ought to be set aside.
14. It is also evident from the Exhibit 2 annexed with the affidavit in opposition that, the Writ of Summons was duly served on the defendant. However, the defendant failed to defend this case as required by the rules of the court. This led sealing of the impugned default judgment in this matter. For this reason a reasonable, I decide that, a reasonable amount of costs should be allowed in favour of the plaintiff to set aside the said default judgment.

15. In result, I make following final orders:

- a. The default judgment entered on 23.12.2018 is set aside, and
- b. The defendant should pay summarily assessed costs in sum of \$ 1,500 to the plaintiff within 14 days from today.

At Lautoka
05.03.2024




U.L.Mohamed Azhar
Master of the High Court