

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

CIVIL ACTION NO.: HBC 367 of 2019

**BETWEEN : PETER MARIO AND LEILANI LABAN MARIO**  
**PLAINTIFFS**

**AND : PATTERSON BROTHERS SHIPPING LTD**  
**DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFFS : Mr. Seduadua [Shekinah Law]**  
**DEFENDANT : Mr Valenitabua [Valenitabua & Associates]**  
**RULING BY : Master Ms Vandhana Lal**  
**DELIVERED ON : 08 February 2024**

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**INTERLOCUTORY RULING**  
[Setting Aside Interlocutory Judgement]

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**Application**

1. This is the Defendant's summons to set aside the interlocutory judgment entered on 09 December 2019 in default of the Defendant filing acknowledgment of service and notice of intention to defend, for irregularity or alternatively, for Court to consider its defences and stay of execution of judgment.

**Defendant's Contention**

2. The Managing Director of the Defendant in his affidavit in support of the summons states that:
  - a. the writ of summons and statement of claim were served at the Defendant's office on 21<sup>st</sup> October, 2020, to a person not

authorized to accept service and stamp documents. Solicitors for the Defendant had advised the solicitors for the Plaintiffs that they hold instructions to accept service. The Directors of the Defendant could not file an acknowledgment of service and notice of intention to defend, as the service was not brought to their attention.

- b. The claim is indorsed with a claim of a description not mentioned in Order 13 Rules 1 to 4 of the High Court Rules. It is neither liquidated, unliquidated nor a mixed claim, but falls within Order 13 rule 6. The interlocutory judgment is also irregular and contrary to Order 20 Rule 2. The Plaintiffs were served contrary to the mandatory requirement of Order 19 Rule 7(3).
- c. The defendant has a meritorious defence.

### **Plaintiff's Argument**

3. The First Plaintiff, in his affidavit in opposition states that the writ of summons and statement of claim were served at the Defendant's registered office on 21<sup>st</sup> October, 2020, in terms of Order 65 Rule 5(2). An affidavit of service was filed. The interlocutory judgment is regular, as the particulars of claim are for liquidated and unliquidated damages under Order 13 Rules 1 and 2. The Defendant has not shown any meritorious defence.

### **Determination**

4. The Defendant seeks to set aside the interlocutory judgment on the ground that the writ of summons and statement of claim were not served on them personally or on its solicitor but served at their registered office.
5. Order 65, Rule 2(d) states that the proper address for service in the case of a corporate body is the registered office.

6. In my view, the service on the Defendant was accordingly, proper. The interlocutory judgment was regularly entered.
7. The explanation given by the Defendant for failure to file acknowledgment of service and notice of intention to defend, viz that the writ of summons and statement of claim were served at the Defendant's office to a person not authorized to accept service, is unacceptable.
8. The next matter for consideration is whether the Defendant has a meritorious defence.
9. It is settled law that in an application to set aside a default judgment entered regularly, the merits of the defence has to be taken into account since there has been no adjudication on the merits.
10. It is not sufficient to show an arguable defence, but there must be a "*real prospect of success*" which "*carry some degree of conviction*" as held in *Wearsmart Textiles Ltd v. General Machinery Hire Ltd* [1998] FJHC 26; Abu0030u.97s (delivered on 29 May 1998) and *Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1886] 2 Lloyd's Rep 331 (CA).
11. The Applicant must produce to the court '*evidence that he has a prima facie case*': *Evans v. Bartlam* [1937] AC 473 at 651.
12. The Plaintiff in their Statement of claim state that the parties entered into an agreement with the Defendant to charter a vessel to travel to Rotuma on 25<sup>th</sup> November 2018, and return to Suva on 11<sup>th</sup> December 2018.
13. It is not in dispute that the Plaintiffs sailed on the vessel to Rotuma on 25<sup>th</sup> November 2018.
14. The case for the Plaintiffs is that the Defendant failed to provide the return journey and left them stranded on the island. The Plaintiffs claim general and special damages for loss and refund for partial performance of the Agreement.

15. The Defendant's defence in their affidavit in support and proposed statement of defence is that the Defendant complied with the agreement. The agreement was frustrated by an Act of God, being the unexpected weather and "*swollen seas*" that adversely affected the Plaintiffs' arrival and departure times. "*Heavy swells*" affected the vessels moorings and safety. Due to bad weather beyond the Defendants' control, the boat was unable to dock for loading and unloading. It was hazardous to passengers, workers and the ship. The paramount consideration by the Captain while anchored in Rotuma was the safety of persons and the ship.
16. The Defendant has raised a meritorious defence relying on the doctrine of frustration.
17. Hence, I find it is only proper to allow the interlocutory judgment to be set aside and the matter be tried on merits.
18. For the delay caused the Plaintiff ought to be compensated by an award for costs.

#### **Orders**

19. On the Defendant's application dated 24 September 2020, the interlocutory judgment sealed on 09 December 2019 is set aside on the following conditions-
  - i. The Defendant to file and serve its acknowledgment of service before 12 noon on 12 February 2024 (subject to late filing fee);
  - ii. The Defendant to file and serve its statement of defence before 12 noon on 16 February 2024 (subject to late filing fee);
  - iii. The Defendant to pay to the Plaintiff costs summarily assessed at \$2,000 and said cost to be paid before 12 noon 16 February 2024;

Should the Defendant failed to abide by above orders, the interlocutory judgment shall remain.

20. Should the Defendant comply with the above orders, the Plaintiff to file and serve a reply to statement of defence by 12 noon on 23 February 2024.

21. The Plaintiff to file and serve a summons for direction by 12 noon on 15 March 2024.



Vandhana Lal [Ms]  
Master of the High Court  
At Suva.

08 February 2024

TO:

1. Suva High Court Civil File No. HBC 367 of 2019;
2. Shekinah Law, Solicitors for the Plaintiffs;
3. Valenitabua & Associates, Solicitors for the Defendant.