

IN THE RESIDENT MAGISTRATES COURT

AT SUVA FIJI ISLANDS

CIVIL JURISDICTION

CIVIL CASE NO: 153 OF 2017

ACTIVE FIJI COMPANY LIMITED

Plaintiff

V

SAVASI ISLAND LIMITED

Defendant

BEFORE : RESIDENT MAGISTRATE L.K.WICKRAMASEKARA
APPEARANCE : SIWATIBAU AND SLOAN FOR PLAINTIFF
R. PATEL LAWYERS FOR DEFENDANT

DATE OF RULING : 11th April 2019

RULING ON MOTION TO SET ASIDE THE DEFAULT JUDGMENT

1. This motion to set aside the 'Default Judgment' entered against the Defendant on the 27/07/2017 and the Judgment Debtor Summons issued on the 03/10/2017 is filed on the 06th of November 2017 with supporting affidavit of Paul Savenkov, a Director of the Defendant Company, dated 13th October 2017.
2. In response one 'David Young', Managing Director for the Plaintiff Company, had filed an affidavit in Opposition dated 24th November 2017.
3. On 30/04/2018, the parties agreed to deal with this application by way of Written Submissions and accordingly parties were allowed time to file their respective

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submissions. The Plaintiff has filed Written Submissions on the 15/06/2018 and the Defendant on the 20/06/2018.

4. Having read the written submissions by both parties, the court identified two challenges to its jurisdiction as raised by the parties;
 - a) Stay of the Judgment Debtor Summons as raised by the Plaintiff that the court had no jurisdiction to do so (at para 2.1 of Plaintiff's written submissions)
 - b) Allowing 5 % interest on the 'Default Judgment' as raised by the Defendant which the court had no jurisdiction to do so (at para 6.0 of Defendant's written submissions)

Court accordingly invited the parties to file further written submissions on the above two issues as the parties submitted no clarification or legal submissions on the above jurisdictional issues other than merely raising the issues in their written submissions.

5. Accordingly, the Plaintiff filed further written submissions on the 30/10/2018 and the Defendant on the 05/11/2018.
6. In considering this application by the Defendant, court has extensively considered the affidavits filed by each party along with their respective written submissions and further submissions.
7. It is to be first and foremost noted that the Defendant had had been served with this Writ of Summons and Statement of Claim on the 20/06/2017 and the duly sworn Affidavit of Service had had been filed of record by 11/07/2017. The matter was first called before this court on the 20/07/2017 where the Defendant had failed to appear or file any Notice of Intention to Defend or a Statement of Defence. As the court was not sitting on that day the matter was adjourned to 27/07/2017 where the Defendant still failed to appear or file a defence. Accordingly, on the application of the Plaintiff under Order VI Rule 8 a final judgment against the Defendant was entered by default.

The defendants then made this application on the 06/11/2017 to have the default judgment set aside after a delay of three and a half months.

8. Before deliberating on the substantive application to set aside the judgment entered by default, the court first needs to decide on the challenges to its jurisdiction as raised by parties, which is elaborated at para 04 of this judgment.

9. I shall first deal with the issue of 'Stay of Judgment Debtor Summons' as raised by the Plaintiff in their written submissions. As per the written submissions of the Plaintiff filed on the 15/06/2017 it is stated;
 - “1.7 03/11/17-Judgment Debtor Summons called before the Magistrate and Defendant informed the court that their application for setting aside was in progress. Court refused to attend to JDS matter but decided to call both matters together.
 - 1.8 06/11/17-Defendants application to set aside Default Judgment was filed and served on the Plaintiff.
 - 1.9 09/11/17-Application to set aside the Default Judgment was called and court gave the Plaintiff 7 days to file its affidavit in opposition to the application. The court did not address the JDS matter but stated that it would hear the two applications before giving directions effectually putting a stay on the Plaintiffs JDS.
 - 2.1 The Plaintiff is seeks [SIC] the court to dissolve the stay it has imposed without jurisdiction to do so and proceed to conducting a means test and granting orders for payment of the judgment sum.”

10. In their further written submissions the Plaintiff had submitted that there are no provisions in the Magistrates Court Rules to stay the JDS and as such the Defendant should have filed a separate application pursuant to High Court Rules (Order 45 Rule 10 of High Court Rules). The Plaintiff submits that such an application for stay of execution of the judgment or order has not been made by the Defendant and as such

the court had no jurisdiction to grant an application which was never made by either of the parties.

11. This however, is a blatant misrepresentation of facts and an attempt to mislead the court by the Plaintiff. The Defendant had by their motion filed on 06/11/2017 at para (b) has specifically sought "That the Judgment Debtor Summons issued on 03rd October 2017 against the Defendant in this action be wholly set aside or alternatively the execution of the said Judgment be stayed forthwith against the Defendant until further order of the court..."
12. Moreover, through the supporting affidavit of Paul Savenkov dated 13/10/2017 at averments number 4 and 14, the Defendant has specifically addressed the stay of execution of the judgment and the JDS. Plaintiff to submit otherwise, having read and replied to the motion and the supporting affidavit of the Defendant, is to willfully mislead the court with malicious intentions.
13. In considering this issue, at the outset it must be noted, that there is no stay order issued by this court in staying the proceedings of the JDS issued by the Plaintiff. There is no 'effective stay' ordered by this court as well. The technical position in the JDS is that it should have been registered as a separate civil action by the Registry so that it would have proceeded independently of this cause facilitating the execution process to proceed expeditiously. As far as this cause is concerned, a final judgment has been entered by default and the Defendant has filed an application for setting aside the default judgment. Thus the action that should technically continue in this cause is the application for setting aside the default judgment. But due to the technicality that the execution process was not separately registered as an independent civil cause, the court decided to take up both matters together and has adjourned the JDS to a suitable time to be dealt with.
14. A court entering a Judgment by default has the jurisdiction to set aside such judgment; unconditionally and as a right of the Defendant, in the event the Judgment is entered irregularly or subject to any suitable conditions and upon satisfaction of legal tests adopted by superior courts, in the event the judgment is entered regularly. This

jurisdiction is clear as per the provisions under Order XXXII Rule 11 and as well as Order XXXIV Rule 3 of the Magistrate Court Rules. Further, the court has the jurisdiction to adjourn the Hearing of a Judgment Debtor Summons time to time. This jurisdiction is provided at Order XXXVI (II) Rule 15.

15. Thus the adjournment of the JDS is not a stay order nor an order to stay the JDS effectively. Thus it is clear the adjournment of JDS is not an act which is done by court exceeding its jurisdiction or in the absence of any jurisdiction. Thus for the counsels for the Plaintiff to have twisted this adjournment and to mislead the court to accept that it had acted without jurisdiction is deceitful and dishonest and is condemned in the strongest terms. Court accordingly reject this foul and deceptive submission.

16. I now come to the submission by the Defendant that the court had no jurisdiction to order interest on the judgment entered by default. When asked by court to further substantiate this point, the Defendant in their further submissions, retrieved the earlier position and had proceeded to cite Order 32 Rule 8 in admitting that the court has the jurisdiction to award interest on any 'judgment or order for payment of money'. The counsels for the Defendant had then invented a new allegation that the court had ordered a wrong judgment sum which is termed in the further written submissions as, 'an erroneous judgment sum without reading the Writ of Claim'. The Defendant had further submitted that the amount allegedly owed is clearly stated at para 5 of the Writ, which is \$ 13373.00 and not \$ 13410.30 as ordered by court.

17. It is sad to see how low the counsels for the Defendant had sunk to, in an attempt to mislead the court to circumvent the course of justice to serve their malice intentions. Whilst the jurisdiction of the court is clear as per the Order 32 Rule 8 in respect of awarding interest on judgment sums, the counsels for the Defendant opted to first suppress the law and create a false jurisdictional issue. When the court had noted this issue and invited the counsels to address the issue further; realizing that their dishonesty been exposed, they then moved on to create a further false allegation in order to cover up the initial dishonest act.

18. The particulars of the claim clearly reads that the **Total sum claimed is \$ 13410.30** which is inclusive of the sum claimed (\$ 13 373.05), Court Fee (\$ 27.25) and Bailiffs Fee (\$ 10.00). For this sum to be stated as an erroneous sum that was ordered by court, is an undoubted display of dishonesty and a nefariousness by the counsel. This deceitful attempt is condemned in even more stronger terms. Accordingly this preposterous and unscrupulous argument is also rejected and dismissed.
19. I now come to consider the merits of the application to set aside the default judgment. When deciding an application for setting aside a 'Default Judgment' the first issue to be deliberated is whether the judgment was entered regularly or irregularly. In either event setting aside is possible in Fiji. However, if the judgment was entered irregularly the Defendant shall have the judgment set aside as of a right and when it is regular then the court will have a wide discretion in setting it aside.
20. In considering the above issue, it is important to identify how a judgment by default is considered to be entered regularly or irregularly. The definition of regular and irregular judgment is accepted to be decided on the definition of the liquidated and unliquidated claim, as the Order VI Rule 8 of the Magistrates Court Rules provides for a default judgment to be entered only in respect of liquidated claims. Order VI Rule 8 reads as follows;
- "8. In the case of liquidated demands only, where any defendant neglects to deliver and serve the notice of defence prescribed by rule 6 within the time limited by the said rule, and is not let in to defend in accordance with the provisions of rule 7, then and in such case the plaintiff may enter final judgment against that defendant".*
21. A liquidated claim is a demand in the nature of a debt which would be a specific sum of money due and payable under a contract and its amount must be ascertained or ascertainable as a mere matter of arithmetic. (See ***Subhodh Kumar Mishra v Car Rentals (Pacific) Ltd (1985) 31 FLR 49***). It is further identified in the above case that a claim is an unliquidated claim even when specified or named as a definite figure, the ascertainment of the sum requires investigation beyond mere calculation.

22. This claim has been particularized by the Plaintiff as a liquidated claim. However, at this instance the court must consider the claim in its entirety and decide whether it is in fact a liquidated claim or an unliquidated claim. When the question of whether the claim is liquidated or unliquidated is determined then the legal matrix on setting aside the default judgment is well settled. I have considered the Fijian case authorities in this regard and find that if the default judgment is entered irregularly, then the Defendant as of a right may have the judgment set aside subject to any terms of costs as decided by the court. If the judgment is entered regularly the Defendant may still have it set aside depending that it satisfy the applicable legal tests as established by the superior court cases. (*See FSCF v Shiu Datt [1988] 34 FLR 67*).
23. The discretion the court has in setting aside a regular judgment is wide. However, this discretion has to be exercised judiciously. The law on setting aside a regular judgment is well settled with many appellate court decisions. In the case of **Nand v Chand; HBC 223.2007 L (7 November 2008)** the legal position on setting aside a regularly entered default judgment has been considered at length having reference to a number of appellate court decisions. As per these authorities it can be construed that the rationale behind exercising this discretion is to avoid any injustice which may be caused if the judgment follows automatically on default.
24. Having careful consideration of the legal authorities the court finds following issues to be addressed in considering an application for setting aside a default judgment entered regularly;
- i. Whether the Defendant has a meritorious defense, which could be simplified to mean that the Defendant should have a defense which discloses an arguable or triable issue.
 - ii. Explanation as to why the Defendant let the judgment to be entered by default.
 - iii. Whether Plaintiff would suffer irreparable harm if the judgment is set aside.
25. The Plaintiff in this case has submitted that this is a judgment entered regularly. It is mentioned in the particulars of the claim that this claim is a liquidated claim. At para

4 and 5 of the statement of claim it is submitted that the sum claim is by way of costs of general maintenance and security of the ship (which is the subject matter of this case) after it was delivered at Savusavu Wharf and this was as per an agreement between the parties. It is also submitted that the amount is clearly raised in the invoices issued to the Defendant by the Plaintiff and that the Defendant had not raised any issues regarding these invoices.

26. Defendant, in their affidavit in opposition and as well as in their submissions, has challenged this position. It is brought to the attention of the court that the Plaintiff has conveniently left out from the statement of claim the reference to a subsequent agreement between the parties in respect of the specific costs of general maintenance and security after the ship been delivered at the Savusavu Wharf. The Plaintiff also in their submissions had admitted the existence of such a subsequent agreement between the parties in respect of these costs, which they have clearly failed to mention in the statement of claim.
27. Having considered all above facts and submissions before this court, it is the finding of the court that this claim is not liquidated. It needs further investigation other than a mere calculation of arithmetic to establish the sum claimed. The terms of agreement, the rates and types of costs on which parties have agreed and basis of such calculations of costs have not been made clear. There is no clear agreement on the amount claimed between the parties in unambiguous terms. The claim certainly needs investigation beyond mere simple calculation. This claim therefore is in fact an unliquidated claim. As such the judgment entered by default in this case have been entered irregularly. Thus the Defendant is entitled as of right to have it set aside.
28. However, at the same time, court find that the Defendant has failed to satisfactorily explain their default of appearance leading to these lengthy proceedings to set aside the judgment. Further, there is substantial delay in making this application which is yet again not satisfactorily explained. As such the Defendant is to be subjected to costs although it is entitled to have the judgment by default set aside as of a right.

29. In the final outcome, I conclude that the Defendant is entitled as of a right to have the default judgment set aside subject to costs. Further, both the Plaintiff and Defendant should be subjected to costs for their unscrupulous conduct in the proceedings, which had resulted in lengthy proceedings and caused undue delay.
30. Accordingly, court makes the following orders;
- i. The default judgment entered against the Defendant on the 27th of July 2017 is hereby set aside, subject to costs.
 - ii. Defendant to pay a cost of \$ 500.00 to the Plaintiff as summarily assessed by court within 14 days from this order as costs of this application.
 - iii. Plaintiff to pay a **court cost** of \$ 300.00 to court as summarily assessed by court within 14 days from this order.
 - iv. Defendant to pay a **court cost** of \$ 300.00 to court as summarily assessed by court within 14 days from this order.
 - v. Defendant given 14 days to file and serve Statement of Defence and the Plaintiff 07 days thereafter to file and serve any Reply thereof.
 - vi. In failure of the Defendant to comply with orders (ii), (iv) and (v) above, order number (i) shall lapse at the expiration of 14 days and the court shall have the matter fixed for a Formal Proof Hearing.
 - vii. In failure of the Plaintiff to comply with orders (iii) and (v) above, Plaintiff shall be further subjected to a court cost of \$ 1000.00 and the cause shall be taken out of the list until such time all cost orders and directions of the court is complied with.
 - viii. The JDS filed by Plaintiff on 03/10/2017 is hereby dismissed and struck out.
31. Proof of payment of costs shall be filed of record by both parties by the next court date.
32. Right to Appeal explained. 07 days for Notice of Appeal. 30 days for grounds of Appeal.




L. K. WICKRAMASEKARA,
RESIDENT MAGISTRATE.