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IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0067 OF 1998
(High Court Civil Case No.HBC 261 OF 1998)

BETWEEN:

SURESH CHARAN

Applicant

AND:

NATIONAL INSURANCE CO. LTD.

Respondent

In Chambers: The Hon. Justice I.R. Thompson, Justice of Appeal

Hearing: 16 November 1998; 19 November 1998, Suva

Counsel: Mr. M. Raza for the Applicant
Mr. K. Muaror for the Respondent

Date of Decision: Friday, 27 November 1998

DECISION IN CHAMBERS

The application now before me is in the names of Suresh Charan and Anuradha Charan. Anuradha Charan was not a party to the proceedings in the High Court; so she has no standing to make the application. I direct, therefore, that her name be removed from the title of this application. Suresh Charan is the sole applicant.

A writ of summons issued out of the High Court to the applicant was served on the respondent on 14 May 1998. The claim was for both liquidated and unliquidated damages. The time within which the notice to defend had to be given was 14 days (High Court Rules 1988 0.13 r.7 read together with 0.12 r.4). On 2 June 1998, after that time had expired, the applicant caused judgment to be entered for the amount of the liquidated damages claimed and

for the unliquidated damages to be assessed. On 3 June 1998 the respondent filed in the High Court an acknowledgment of service of the writ of summons. It subsequently applied for the default judgment to be set aside. In pursuance of 0.13 r.10 Scott J., having received evidence from both parties by affidavit, set it aside.

The application before me now is made to a single judge of the Court of Appeal. It seeks first to have Scott J's order set aside and the default judgment restored. Except with the consent of the respondent a single judge cannot do that. However the application is, in the alternative, for leave to appeal against the order. A single judge does have power to deal with that application and I now do so.

The applicant says that the evidence before the learned judge did not justify the order which he made. He points first to the fact that the only affidavit filed in the High Court by the respondent was sworn by a barrister and solicitor employed by the firm of solicitors representing the respondent. She gave an account of the circumstances in which the notice of intention to defend was not filed within the time limit. She also exhibited to the affidavit a draft statement of defence and stated the grounds of defence in terms of facts alleged in the statement of defence. She did not herself assert the existence of any of those facts. Nor did she exhibit to her affidavit any documents relating to them (other than the draft statement of defence). There was, therefore, no affidavit of merits before Scott J. In *Wearsmart Textiles Ltd. v. General Machinery Hire Ltd. and Sharma* (Civil Appeal No. ABU 0030 of 1997S: 29 May 1998) this Court held that a party seeking to have a default judgment set aside must adduce evidence of facts to show that he has a meritorious defence, as that expression has been explained in *Alpine*

Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyds Rep. 221.

Second, the applicant points to evidence contained in affidavits filed in this Court which show that, although the respondent in its intended defence proposes to allege that it had cancelled the applicant's insurance policy before the event which gave rise to the claim which was the subject of the action in the High Court, it accepted his claim on the policy and was going to pay him on it until a dispute arose about the quantum. He contends, therefore, that the first limb of the defence lacks merit. The second limb of the defence relates to offers made to the applicant by the respondent and, according to it, unreasonably rejected by him. Essentially the dispute between the parties concerned mainly the amount which the respondent was willing to pay for spare parts needed for the repair of the applicant's car. In his statement of claim the applicant said that the respondent was prepared to pay only 70% of the list price for the spares. From the bar table Mr. Muaror told me that it did so because the respondent has a standing agreement with the company which was to provide the spare parts that it would give the respondent a discount of 30% on spare parts provided to it. However, the applicant asserted in his statement of claim (paragraph 12) that the company refused to give the 30% discount and the respondent in its statement of defence totally failed to answer that assertion. Mr. Muaror informed me that a denial of the assertion had been omitted from the draft statement of defence due to an oversight. However, the draft defence lacked any such denial when Scott J. had to consider the respondent's application to set aside the default judgment.

This Court is reluctant to give leave to appeal against interlocutory orders made in actions in the High Court. However, I am satisfied that the applicant has established that

he has good grounds for an appeal. The interlocutory order in this instance does not relate, as so often such orders do, to matters of a procedural nature. It deprives the applicant of the benefit of a judgment entered in his favour. In those circumstances I consider that leave to appeal should be granted.

Order: Leave to appeal is given. The notice of appeal is to be filed and served within 21 days. The costs of this application are to be costs in the appeal.

FIJI COURT OF APPEAL

I.R. Thompson

Justice I. R. Thompson
Justice of Appeal

Solicitors:

Applicant In Person
Cromptons, Suva for the Respondent

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