IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 338 of 2012

BETWEEN	:	**ZELDA ROSLYN KISSUN**
		Plaintiff
A N D	:	**SAMUELA NAITAU**
		First Defendant
	:	**BW HOLDINGS LIMITED**
		Second Defendant
	:	**ROCK TEK LIMITED**
		Third Defendant
COUNSEL	:	Mr. H. Nagin for the Plaintiff Mr. T. Tuitoga for the Defendants
Date of Hearing	:	**19th January, 2016**
Date of Ruling	:	**22nd February, 2016**

RULING

[1] The plaintiff instituted these proceedings to recover damages (special and general) for the injuries caused to her due to the negligence of the 1st and 2nd defendants. The 3rd defendant was made a party on the basis that it was vicariously liable for the negligent driving of the 1st defendant who was, at the time of the accident, driving the vehicle under its employment.

[2] It is the position of the plaintiff that the vehicle which was driven by the 1st defendant collided with the trailer bearing registration No. FP 176 which was left unattended on the road. The 2nd defendant was made a party to the action as the owner of the said trailer on the basis that leaving it unattended on the road without any mark or sign contributed to the accident in which the plaintiff sustained injuries.

[3] The amended writ of summons was filed on 30th December 2012 and the affidavit of service was filed on 21st January 2013. It is common ground that the 2nd and 3rd defendants did not file their intention to defend the action. The Court entered judgment for the plaintiff against these two defendants which was sealed on 26th February 2013.

[4] The 2nd defendant thereafter made this application seeking to have the default judgment entered against it dissolved and for leave to defendant the action under and in terms of Order 45 rule 10 of the High Court Rules which provides as follows;

> Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

[5] It appears that Order 45 rule 10 referred to above confers discretion on the Court to make orders such as dissolving the judgements entered by default and staying execution of such judgments or decisions.

[6] It is the contention of both the parties that in exercising the discretion conferred upon it by order 45 rule 10 the Court must have regard to the following factors;

i. There must be before the Court an affidavit to show that the defendant has a defence on merits;
ii. Adequate reasons must be given as to why the judgment was allowed to be entered by default;
iii. The application to set aside the default judgment must be made promptly and without delay. The delay must reasonably be explained; and
iv. Whether the plaintiff will be prejudiced as a consequence of setting aside the default judgment?

{**FNPF Board v Shri Datt [1988] 34 FLR 67**}

[7] On behalf of the 2nd defendant one of its directors Ugesh Narayan filed an affidavit stating the manner in which the accident occurred. The facts stated in his affidavit are briefly as follows;

> Ravendra Kumar was the driver of the truck bearing registration No. EV 247 and on the day of the accident he was towing the trailer belonging to the 2nd defendant bearing registration No. FP 176. While the trailer was being towed one of its tyres punctured and the axel broke. The driver then left the trailer on the road in front of the Total Service Station since it was unsafe and basically impossible for him to tow it any further and placed number of cones around the truck. He also states that the 1st defendant had been driving the vehicle without proper lookout and at an excessive speed.

[8] It is not a disputed fact that the 2nd defendant failed to give notice of intention to defend the action as required by the Rules of the High Court.

[9] I will now consider whether the 2nd defendant has disclosed a defence in the affidavit on merits.

[10] The learned counsel for the 2nd defendant relied on the following observations of Lord Denning in the case of **Burns v. Kondel [1971] 1 Lloyd's Rep. 554**;

> We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a *good* defence on the merits. He need only show a defence which discloses an arguable or triable issue. In an accident case, it is sufficient if he shows that there is a triable issue of contributory negligence. A plea of contributory negligence, if successful, may reduce the damage greatly.

[11] In the case of **Wearsmart Textiles Limited v General Machinery Hire Limited and Shareen Kumar Sharma ABU 0030/97S** the Court of Appeal held:

> Dealing with the discretionary powers of the Courts under English Order 13 r. 9 sub-rule 14 of the Supreme Court Practice 1997 (the White Book) (Vol. 1 p.145) cites the Court of Appeal's judgment in Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's 221 as authority of the following propositions:

(a) It is not sufficient to show merely "arguable" defendant that would justify leave to defend under order 14; it must both have "a real prospects of success" and "carry some degree of conviction". Thus the Court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside.

[12] The acts of negligence of the 2nd defendant according to the statement of claim of the plaintiff briefly are causing or permitting the trailer to be parked on the middle of the road unattended and leaving it on the road without any sign of warning and failing to remove it.

[13] **Salmond and Heuston on The Law of Torts** (at page 94) - It is now clear that the fact that a vehicle has broken down on the highway in the dark and it lights have gone out without any negligence on the part of the driver does not constitute nuisance (or negligence) immediately and automatically. The driver may, however, be liable if allows the unlighted vehicle to obstruct the highway without taking reasonable steps to light it or remove it or give warning to its existence.

[14] It is clearly stated in the affidavit of Ugesh Narayan that the driver placed number of cones around the truck. From the depositions contained in the said affidavit it appears that the driver had no alternative other than leaving it on the road and making it visible to the other users of the road. If the driver of the 2nd defendant took all precautionary steps to make the other users of the road aware of this trailer being parked on the road it cannot be said that the 2nd defendant was negligent. This is a matter of evidence upon which the Court has to make a finding at the conclusion of the trial but for the purpose of this application the averments in the affidavit strongly suggests that the 2nd defendant has a prospect of success if it is allowed to defend the action.

[15] Order 12 rule 1(1) of the High Court Rules provides that subject to rule 1(2) of Order 12 and to order 80 rule 2, a defendant to an action begun by writ may (whether or not he is sued as a trustee or personal representative or in any other representative capacity) acknowledge service of writ and defend the action by a solicitor or in person.

[16] Order 12 rule 4(a) of the High Court Rules provides as follows;

References to these Rules to the time limited for acknowledging service are references –

> in the case of a writ served within the jurisdiction, to fourteen days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these Rules, to that time as so extended.

[17] In the case of **Meli Tabu v Suva City Council HBC 203 of 2002** it was held:

> There are two competing principles in considering such an application. The first is the compliance with the rules of the Court. The High Court Rules set certain time limits in procedural matters like filing of acknowledgement of service, defence and reply to defence. These time limits are there for the purpose of ensuring that litigation once begun is expeditiously dispatched and not to allow to clog the civil court. The rules of court lay down not only minimum standards of desirable practice from civil litigants but also enforceable norms.
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> Opposed to the above principle is that a litigant should not be denied access to court and to have the matter adjudicated on merits simply because of his/her procedural lapses or defaults. Hence we have principle of compulsory compliance with rules versus excuses for such compliance. If the courts were to excuse every time there was failure to comply with the rules then the time limits set by the courts and the rules themselves would be treated by the litigants as non-binding guidelines.
>
> This is the reason why the court is vested with discretion to ensure that the rules of the court are respected and at the same time ensure that mere failure to obey rules is not used to deny a litigant adjudication on merits.

[18] The excuse offered by the 2nd defendant for not giving notice of intention to defend is that it first informed the insurer, The Sun Insurance, about the case and that there was a delay on the part of the insurer. This is not a ground for the 2nd defendant to delay the filing of its intention to defendant the action. There had been no difficulty for the 2nd defendant to inform the Court of its intention to defend the action while the insurer was making other necessary arrangements. The explanation offered by the 2nd defendant for not giving the notice of intention to defendant within the time prescribed by the Rules is not acceptable.

[19] Order 2 rule 2(1) of the High Court Rules provides that an application to set aside for irregularity any proceedings, any steps taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

[20] The learned counsel for the plaintiff submitted that an application of this nature must be made promptly and without delay. He, in this regard, relied on the decision of the Court of Appeal in the case of **Pankaj Bamola and Anand Priya Maharaj v Moran Ali** Civil Appeal No. 50 of 1990. In that case the application was filed nearly eight months from the date the respondent was served with a sealed copy of the order.

[21] In this case there is no such long delay. The application to set aside the default judgment was made within a month which in my view cannot be considered as an unduly long delay.

[22] Taking all these factors into consideration, especially the fact that the 2nd defendant has a very strong defence with reasonable chance of success I am of the view that application of the 2nd defendant should be allowed.

[24] The learned counsel for the plaintiff submitted that the Court is empowered to order the 2nd defendant to pay into the Court a sum of money as a precondition to allowing it to defend the action in terms of order 13 rule 10 and order 19 rule 9 and cited the following decisions in support of his contention.

> **BPT (South Sea) Company Limited v Ashwin Datt Sharma**, High Court of Suva Civil Action No. HBC 445 of 1995.
>
> **South Pacific Recordings Limited v Yusuf Ismail & Two Others**, High Court of Suva Civil Action No. HBC 597 of 1993.
>
> **Credit Corporation (Fiji) Limited v Jale Silimaibau**, High Court of Suva Civil Action No. HBC 464 of 2000S.

[25] Order 13 refers to liquidated claims. In this case the claim for damages of the plaintiff is not liquidated. However, since the 2nd defendant has filed an affidavit showing the Court that it has a very valid and sustainable defence I do not inclined to order the 2nd defendant to pay into Court a sum of money. It is also pertinent to note that since the damages claimed are not liquidated there is no basis for the Court calculate an amount which the 2nd defendant should be ordered to deposit.

[26] In **BPT (South Sea) Company Limited v Ashwin Datt Sharma** (supra) although the High Court has directed the defendant to pay into Court $ 25,000, it does not say the basis on which the Court arrived at the amount so ordered. In both **South Pacific Recordings Limited v Yusuf Ismail & Two Others** (supra) and **Credit Corporation (Fiji) Limited v Jale Silimaibau** (supra) the damage claimed was liquidated.

[27] For the reasons aforesaid I make the following orders.

ORDERS

1. The default judgment entered against the 2nd defendant (sealed on 26th February 2013) is set aside.

2. The 2nd defendant shall file its statement of defence within two weeks from today.

3. The 2nd defendant shall pay the plaintiff $ 2000 as costs of this application.

Lyone Seneviratne

JUDGE.

22.02.2016