IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 156 of 2012

BETWEEN : **SHIU KAMAL SINGH** of Vusuya Road, Nausori, Businessman.

PLAINTIFF

A N D : **SUVA CITY COUNCIL** a local body corporate duly constituted under the Local Government Act with the office in Suva.

1st DEFENDANT

AND : **LAND TRANSPORT AUTHORITY** duly governed under the Land Transport Act, having its registered office in Valelevu, Nasinu.

2nd DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. K. Maisamoa for the Plaintiff
Mr. N. Lajendra for the 1st Defendant
Mr. S. Nandan with Ms. M. Ligabalavu for the 2nd Defendant

Dates of Hearing : 14 April 2016

Date of Ruling : 21 June 2016

RULING

INTRODUCTION AND BACKGROUND

[1] This is an application made by the Plaintiff, by way of a Writ of Summons. The Writ of Summons together with a Statement of Claim was filed in Court on 7 June 2012.

[2] The matters stated in the Statement of Claim filed by the Plaintiff can be summarised as follows:-

1. That the Plaintiff is a businessman operating a truck business carting wood from rural areas in greater Nausori District.

2. That the 1st Defendant is a local body corporate duly constituted under the Local Government Act (Chapter 125) and the 2nd Defendant is duly constituted under the Land Transport Act of 1998.

3. That through a paid advertisement of the 1st Defendant the Plaintiff applied for the tender of motor vehicle DC 653. Accordingly on 12 August 2009, the Plaintiff was awarded the tender and informed to arrange for payments of the remaining sum of money.

4. That the 1st Defendant gave a copy of the Transfer Form to the 2nd Defendant for processing, which was signed by the 1st Defendant's Works Manager.

5. However, the 2nd Defendant did not affect the transfer of the vehicle due to some outstanding arrears owed by the 1st Defendant to the 2nd Defendant.

6. That the 1st Defendant did not disclose to the Plaintiff that motor vehicle DC 653 has a recurring debt with the 2nd Defendant, whilst advertising the said vehicle for sale by tender.

7. That the 2nd Defendant has acted negligently towards the Plaintiff in not transferring the motor vehicle.

8. That the two Defendants have put the blame on each other regarding the said debt.

9. That due to the facts stated in (5), (6), (7) and (8) above that hardship has been caused to the Plaintiff.

10. That because the vehicle cannot be transferred the Plaintiff has sustained loss of business which the purchase of the motor vehicle would have served.

11. The Plaintiff has estimated the particulars of loss for carting of wood annually at $75,956.26.

[3] Accordingly the Plaintiff claims the following reliefs:

(a) The sum of $227,868.78 (Two hundred and twenty seven thousand eight hundred and sixty eight dollars and seventy eight cents) for the loss of business for three years;

(b) Interest to be decided by the Honourable Court;

(c) Cost of the action;

(d) Such further and/or other relief this Honourable Court may deem just.

[4] On 5 July 2012, the 1st Defendant, Suva City Council, filed a Statement of Defence. The Plaintiff filed a reply to this Statement of Defence filed by the 1st Defendant, on 25 July 2012.

[5] Since no steps had been taken in this matter for more than 6 months, on 25 November 2013, a show cause was issued on the Plaintiff, pursuant to Order 25 Rule 9 of the High Court Rules 1988, as to why this application should not be struck out for want of prosecution or as an abuse of the process of Court.

[6] On 23 May 2014, a Ruling was made by the Master directing the Plaintiff to file Summons for Directions within 2 weeks, if not, that this action will deem to be struck out.

[7] On 28 July 2014, a Judgment in Default was entered against the 2nd Defendant, the Land Transport Authority. The Judgment reads as follows: "No Acknowledgement of Service and no Statement of Defence having been filed by the 2nd Defendant herein, it

is this day adjudged that the 2nd Defendant do pay the Plaintiff the sum of $227,868.78 [Two Hundred and Twenty Seven Thousand Eight Hundred and Sixty Eight and Seventy Eight Cents]".

[8] Thereafter, the High Court Registry had gone on to enforce the Default Judgment against the 2nd Defendant by way of a Writ of *Fieri Facias*. In execution thereof the Court Sheriff had seized certain vehicles belonging to the 2nd Defendant. However, it is found in the record (correspondence dated 6 October 2014) that the executed vehicles were released by the Registry because it later found out that the Default Judgment entered was a claim for unliquidated damages and will need the same to be assessed by Court.

[9] On 15 September 2014, the 2nd Defendant filed a Summons seeking the following Orders:-

(a) That the Judgement in Default entered against the 2nd Defendant on 28 July 2014 be wholly set aside unconditionally;

(b) That the execution of Default Judgment entered against the 2nd Defendant be stayed pending the determination of this application;

(c) That leave be given to the 2nd Defendant to file its Acknowledgement of Service and the Statement of Defence;

(d) Any other Orders that the Court deem just and equitable.

[10] This Summons was supported by an Affidavit deposed by Faranisese Kinivuwai, Manager Legal Services of Land Transport Authority, based at its Valelevu Office.

[11] On 21 October 2014, the Plaintiff filed an Affidavit in Reply to the Affidavit in Support of setting aside the Default Judgment. An Affidavit in Response to this Affidavit in Reply was filed by the aforesaid Faranisese Kinivuwai, on 6 February 2015.

[12] Soon after, on 27 October 2014, the Plaintiff filed an Ex Parte Notice of Motion seeking the following Orders:-

1. That the Writ of *Fieri Facias* filed by the Plaintiff to be enforced against the 2nd Defendant.

2. That the Senior Court Officer, Mr. Vilikesa Qauqau, not to intervene with the enforcement of the Writ of *Fieri Facias* when it is sealed.

3. That the letter written by Senior Court Officer, Mr. Vilikesa Qauqau, to the Chief Executive Officer of the 2nd Defendant, on 6 October 2014, is a Contempt of Court proceedings.

[13] This Ex Parte Notice of Motion was supported by an Affidavit deposed to by the Plaintiff and filed on 27 October 2014.

[14] An Affidavit in Reply to the said Affidavit in Support of the Ex Parte Notice of Motion was filed by Faranisese Kinivuwai, in February 2015.

[15] Both applications came up before the Master of the High Court. On 3 June 2015, the Master ruled that he has jurisdiction to hear and make a determination regarding the Writ of *Fieri Facias* filed by the Plaintiff to be enforced against the 2nd Defendant (the first Order sought in the Ex Parte Notice of Motion). However, the Master ruled that he had no jurisdiction to adjudicate upon the other two matters in the Ex Parte Notice of Motion; namely that the Senior Court Officer, Mr. Vilikesa Qauqau, is not to intervene with the enforcement of the Writ of *Fieri Facias* when it is sealed and that the letter written by Senior Court Officer, Mr. Vilikesa Qauqau, to the Chief Executive Officer of the 2nd Defendant, on 6 October 2014, is in Contempt of Court.

[16] In the circumstances, the Master referred the said Ex Parte Notice of Motion filed on 27 October 2014, to the High Court for directions.

[17] Accordingly both applications, the Summons for setting aside the Default Judgment and the Ex Parte Notice of Motion, came up before me. On 16 February 2016, it was decided that the Summons for setting aside the Default Judgment should be taken up for hearing first.

[18] The Summons for setting aside the Default Judgment was taken up for hearing before me on 14 April 2016. Both Counsel for Plaintiff and 2nd Defendant were heard. The parties also filed detailed written submissions, which I have had the benefit of perusing. The Counsel for the 1st Defendant did not make or file any submissions in Court.

LEGAL PROVISIONS AND ANALYSIS

[19] The 2nd Defendant has filed the Summons for setting aside the Default Judgment in terms of the provisions of Order 19, Rule 9 of the High Court Rules, 1988. The Rule provides as follows:

> *"The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order".*

[20] A Default Judgment can be entered at two different stages of a Civil Action. The first is under Order 13, Rules 1 – 6, when a Defendant fails to give a notice of intention to defend within the time limit specified in the High Court Rules. The second is in terms of Order 19, Rules 2 – 7, when a Defendant fails to serve a defence on the Plaintiff within the time limit stipulated by the High Court Rules.

[21] Where a Defendant fails to give a notice of intention to defend within the time limit specified, and it is a claim for liquidated demands it would be dealt with under the provisions of Order 13, Rule 1, while if it is a claim for unliquidated damages it would be dealt with under Order 13, Rule 2. The two rules are reproduced below for the purpose of analysis:-

Rule 1(1) – *Where a writ is indorsed with a claim against the defendant for a liquidated demand only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.*

Rule 2 - *Where a writ is indorsed with a claim against the defendant for unliquidated damages only, then, if that defendant fails to give notice of intention to defend, the*

plaintiff may, after the prescribed time, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

[22] Similarly when a Defendant fails to serve a defence on the Plaintiff within the time limit stipulated, and it is a claim for liquidated demands it would be dealt with under the provisions of Order 19, Rule 2, while if it is a claim for unliquidated damages it would be dealt with under Order 19, Rule 3. The said two rules are reproduced below:-

Rule 2(1) - *Where the plaintiff's claim against the defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.*

Rule 3 - *Where the plaintiff's claim against the defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.*

[23] Further a Default Judgment can be obtained regularly or irregularly and the law provides that both of these forms of Judgments can be set aside. However, there is a clear distinction between setting aside a Judgment which was in fact regular and setting aside a Default Judgment for irregularity.

In the case of **Alaby v. Praetorious** [1888] 20 QBD 764, Fry L.J. drew the distinction between the two as follows:-

"There is a strong distinction between setting aside default judgment for irregularity in which case the court has no discretion to refuse to set it aside, and setting it aside

where the judgment though regular has been obtained though some slip or error on the part of the Defendant in which case the court has a discretion to impose terms as a condition of granting the Defendant relief."

[24] This principle has been adopted and applied by the Fiji Court of Appeal in the case of ***Subodh Kumar Mishra v. Rent-a-car*** (1985) 31 FLR 52.

[25] Thus, where a default judgment is entered irregularly, which irregularity cannot be cured, the Defendant is entitled as of right to have the judgment set aside.

[26] In the instant case, the Plaintiff states in his Statement of Claim that the particulars of loss for carting of wood annually is $75,956.26. However, the Plaintiff has not provided any details as to how he arrived at or computed this figure. In the relief prayed for the Plaintiff has merely multiplied the above sum by three (which he states is the loss of business for three years) and arrived at a figure of $227,868.78.

[27] As such, this Court is of the view that this is clearly a claim for unliquidated damages.

[28] It is clear from a reading of Order 13, Rule 2, and Order 19, Rule 3, that where the Plaintiff's claim is for unliquidated damages ***the Plaintiff may enter interlocutory judgment against that Defendant for damages to be assessed and for costs.***

[29] Thus it was incumbent on the Plaintiff in this case to enter an interlocutory judgment against the 2nd Defendant and not a final judgment. However, it is clear that the Default Judgment entered in this case against the 2nd Defendant is in the form of a final judgment. It is not entered in the form of an interlocutory judgment, whereby damages and costs are to be assessed subsequently.

[30] As such, in the view of this Court this is a Default Judgment which has been obtained irregularly. This irregularity cannot be cured and the 2nd Defendant is entitled as of right to have the judgment set aside.

[31] In the written submissions filed by the 2nd Defendant it is stated that the Default Judgment is also irregular due to the fact that the 2nd Defendant is an agent of the State and as a consequence that the Crown Proceedings Act (Chapter 24) will apply

to these proceedings. It is also stated that Order 77 of the High Court Rules, dealing with proceedings by and against the State, and specifically Order 77, Rule 6, would apply to these proceedings.

[32] However, it would not be necessary for Court to make a determination on the above matters, since Court has already come to a finding that the Default Judgment entered against the 2nd Defendant is irregular as the Plaintiff's claim is for unliquidated damages thereby requiring the Plaintiff to have entered an interlocutory judgment against the 2nd Defendant for damages to be assessed and for costs.

CONCLUSION

[33] For all the aforesaid reasons, it is the view of this Court that the 2nd Defendant is entitled to the Judgement in Default entered against them to be wholly set aside.

[34] Accordingly, I make the following Orders:

ORDERS

1. The Judgement in Default entered against the 2nd Defendant, on 28 July 2014, is wholly set aside;

2. Leave is hereby granted to the 2nd Defendant to file and serve its Statement of Defence within 14 days of this Ruling;

3. The 2nd Defendant shall pay the Plaintiff costs summarily assessed at $1500, within 30 days from today.

Dated this 21st day of June 2016, at Suva.

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

HIGH COURT OF FIJI SUVA