IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 20 of 2018

BETWEEN : **AIYUB KHAN t/a A. KHAN HIRE SERVICES**

PLAINTIFF

AND : **RPA GROUP (FIJI) LIMITED**

DEFENDANT

Appearances : Maqbool & Co for the Plaintiffs
Tirath Sharma Lawyers for the Defendant

Ruling : 05 May 2020

RULING

Background

1. The Plaintiff commenced this action by a writ of summons issued on 29 May 2018. Though served with the writ on 12 July 2018, the Defendant did not acknowledge service until 17 August 2018. No statement of defence was filed within the time stipulated by the Rules and the Plaintiff entered default judgment in the sum of $558,679.70; interest at the rate of 13% per annum, and general damages to be assessed.

2. The default judgment was served on the Defendant on 9 January 2019.

3. On 17 October 2019, the Defendant filed this summons to set aside the Default Judgment; stay execution until final determination of this matter; seek leave to file its

statement of defence out of time, and; such further orders the Court deems just and appropriate in the circumstances.

4. The application is made pursuant to Order 3 rule 4, Order 12 rule 5, Order 13 rule 8 of the High Court Rules, and the inherent jurisdiction of the High Court.

The law

5. Order 3 rule 4 provides for extension or abridgment of time within which a person is required or authorized by the Rules, a judgment, order or direction, to do an act.

6. Order 12 deals with acknowledgement of service of writ or originating summons. Rule 5 of this Order makes provision for late acknowledgement of service. Sub-paragraph (1) requires leave of the Court to file a notice of intention to defend where judgment has been obtained in the action. Though sub-paragraph 2 permits acknowledgment of service out of time (except where judgment has been entered), this of itself does not have the effect of extending time for the filing of a defence, nor does it permit any other act. A defendant who wants extension of time to file a defence must apply for such an order in the usual way. (Order 12 rule 5 (2); see also *The Supreme Court Practice 1999* Vol 1, pg. 131, at 12/6/2)

7. Order 13 sets out, amongst other things, the consequences of a failure to give notice of intention to defend and the procedure to follow in entering default judgment.

On entering judgment in default of pleadings

8. Where the claim is for a liquidated sum only, the failure to file a defence within the time stipulated by the Rules entitles the Plaintiff to, inter alia, enter final judgment against the Defendant for a sum not exceeding the amount claimed in the writ. (Order 19 Rule 2).

9. A claim for unliquidated damages only entitles the Plaintiff, where there is a failure to file a defence within time, to enter interlocutory judgment against the Defendant for damages to be assessed, and costs. (Order 19 Rule 3)

10. The failure of a defendant to file a statement of defence in proceedings where a writ is endorsed with two or more of the claims mentioned in Order 19 rr 2-5 entitles the Plaintiff, after the prescribed time, to enter judgment in any such claim as he would be entitled to under the Rules.

11. Where the claim falls outside the nature of claims provided for in Order 19 rr 2-5, the failure to file a defence within time entitles the Plaintiff to apply to the Court for judgment. An application for leave to enter judgment in this way must be made by summons or motion under Order 19 Rule 7 (3), and served on the defendant against whom it is sought to enter judgment.

On setting aside default judgment

12. A default judgment regularly entered in compliance with the Rules requires the defendant to show an affidavit of merits in order to succeed in setting aside the default judgment. (*Fiji Sugar Corporation Ltd. v Ismail* [1988] FJCA 1; [1988] 34 FLR 75 (8 July 1988)).

13. On the other hand, an irregular default judgment entitles the Defendant to have it set aside as of right without condition. (*White v Weston* [1968] 2 Q B 647; *Anlaby v Praetorious* (1888) 20 Q.B.D. 764 at page 769 per Fry L.J.; *Fiji Development Bank v Lal* HBC 273 of 2012 per Kumar J)

14. The principle behind this power of the Court was stated by Lord Atkin in *Evans v. Bartlam* [1937] A.C. 473 at 480, to be:

> …that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. (Emphasis added)

15. The Court has no discretion to refuse to set aside an irregular judgment. (*Anlaby v Praetorious* (supra))

Analysis

16. In this case, the Defendant acknowledged service and gave notice of intention to defend. What it failed to do was file a statement of defence, and for this failure, the Plaintiff entered default judgment against it.

17. The Defendant relies on Order 13 Rule 8 to set aside default judgment. The said rule is titled "Proof of service of writ" and contains the mandatory requirement that there be proof of service before a judgment is entered against a defendant for failure to file notice of intention to defend under Order 13. In this case, the Defendant admits being served. Service of writ is therefore not in issue and proof of service, not necessary.

18. In addition, Order 13 applies where there is a failure to give notice of intention to defend which is not the case here.

19. For the above reasons, I consider the application has been brought pursuant to the wrong rule, and ought to have been made pursuant to Order 19, which has the same principles as those in Order 13.

20. The Plaintiff made no objection on this ground but it is something the Court cannot ignore simply because the other side does not raise it. In *Dioge v Chetty* [2004] FJLawRp 13; [2004] FLR 72 (5 April 2004), the Defendant had relied on Order 19 (default of pleadings) to bring an application to set aside a default judgment entered in default of a notice of intention to defend. Jitoko J held this to be a fundamental error which an exercise of the Court's discretion could not rectify. (See also *Chul v Doo Won Industrial (Fiji) Ltd* Civil Action No. HBC0011R.2004 – Decision of 4 October 2004)

21. Subsequently in *Chand v Commissioner Northern* Civil Action No. HBC0054D of 2002B – Decision of 22 November 2005), Jitoko J distinguished *Dioge* (supra) on its facts and held, in an application erroneously made under Order 13 instead of Order 19:

> The law is as stated by Lord Atkin in *Evans v Bartlam* (1937) AC 480, that the Court has the power to set aside a judgment where "it has only been obtained by a failure to follow any of the rules of procedure."

22. In *Maharaj v Matakula* [2019] FJHC 307; HBC92.2015 (5 April 2019), the Court dealt with an application for reinstatement of a matter taken off the list for the non-appearance of the plaintiff. One of the preliminary objections against the application was the reliance on the wrong rule. In support of its objection and citing *Dioge* (supra) the first and second defendants had argued a fundamental error in making the application under the wrong rule. Of this error, the Court stated:

> But I do not for one moment accept that the second defect in the procedure in the present case is fundamental: for example, where a writ has not been served as required by the rules, or notice of discontinuation has been given without leave where leave was needed; or a writ has, without leave to renew, been served more than 12 months after its issue; or a judgment in default has been irregularly signed. I do not for one moment accept that the defects in the procedure in the present case fall into said category. Besides, there is no evidence of the defendants having suffered any prejudice by reason of the plaintiff's procedural error. I would of course not hesitate, in the exercise of my discretion under order 2, rule 1(2) to give leave to the plaintiff to amend her notice of motion to state the rule under which the application is made for re-instatement, and to proceed with her application. I must confess that it seems strange that the court should be deprived of any power to remedy the situation, especially where the defendants have suffered no prejudice.

23. In *Mishra (trading as Super Construction & Interiors) v Prasad* Civil Action No. HBC 92 of 2014 – Decision of 5 November 2018, the Court dealt with an appeal from the dismissal of an application to set aside a default judgment, by reason of a reliance on the wrong rule. There, the Defendant had relied on Order 19 rule 9 instead of Order 13 rule 10. In dealing with the appeal, the Court stated, inter alia:

> …in either case, whether the application to set aside the regularly entered default judgment is filed under O 13, R 10 or under O 19, R 9, the applicable principles are the same…The plaintiff would have filed an application to strike out the defendant's setting aside application on the ground that it has been filed under the wrong Rule (O 19, R 9) if had intended to do so. Alternatively, the Master could have dealt with the application to set aside as an application filed in pursuance of O 13, R 10 instead of dismissing the application without considering the merits of the application, especially in the absence of any prejudice to

> the plaintiff. Technicality should not stand in the way of access to justice. In my opinion, the Master could have considered the application to set aside the default judgment on merits rather than dismissing it on a technical ground that it was filed under wrong Rule. Appeal ground 2 has merit and the appeal succeeds on that ground.

24. In this case, the Plaintiff has not objected to the rules relied on by the Defendant in this application. In light of the decisions in *Chand*, *Mishra*, and *Maharaj* (supra) and the law being clear that "…unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure" (*Evans v Bartlam* (supra), I deal with the merits of the application under Order 19 rule 6.

25. I propose however to deal first with the Plaintiff's preliminary objection that Ronesh Kumar, deponent of the affidavit in support, is not authorised to swear the said affidavit, and that the affidavit is not compliant with the rules of the Court.

26. In *Pillay v Barton Ltd* Civil Action No. HBC 63 of 2014, the Master dealt with a preliminary objection against an affidavit sworn on behalf of a company without written authority. Following a review of relevant cases, the Court stated:

> …the court in **Total (Fiji) Ltd v Khan** [2010] FJHC 206; HBC023.2008 (11 June 2010) concluded that, the two officers, who held relatively senior management positions of the company had the authority to swear the affidavits even though there was no written authority from the company. For the above reasons, I am fortified in my view that, it is the Order 41 rule 5 of the High Court Rules that applies to the contents of both affidavits sworn by a natural person or filed on behalf of a legal person (company). The reading of Order 41 rule 5 together with the relevant provisions of the Companies Act comes to the conclusion that, if an affidavit is sworn by a director or an employee of a company, it is presumed that, such person has authority to swear the said affidavit and there is no necessity to call for a ***written authority*** for them, it is stated that, the particular person has the authority to make the affidavit. If it is a director of the company he or she would, definitely, have the knowledge of the facts contained in the said affidavit and if it is an employee, the court may have to examine, depending on the position of that person in the company, whether he or she is able of his or her own knowledge to

prove the facts averred in the affidavit as per the requirement off Order 41 rule 5 of the High Court Rules.

27. Ronesh Kumar who swears the affidavit in support is the Managing Director of the Defendant Company. The Plaintiff does not deny Ronesh Kumar's status as Managing Director. For the reasons in *Total*, and *Pillay* (supra), I hold that he is presumed to have authority and that a written authority from the Company to this effect is therefore not necessary.

Regular or irregular judgment

28. On the substantive application, the first issue for the Court's determination is whether the default judgment of 5 December 2019 is regular or not. Notwithstanding both parties agreeing the default judgment is regular, I am of the view that this is a matter for the Court. Conceding that a judgment is regular does not have the effect of rendering regular an otherwise irregular judgment.

29. The Defendant admits personal service of the writ on its office and says that the default judgment entered by the Plaintiff is regular.

30. The Plaintiff's claim arises out of a work and services contract between the parties which the Plaintiff pleads has been breached by the Defendant. The relief sought is for:

(i) Judgment in the sum of $558,679.70.
(ii) Interest at the rate of 13% per annum.
(iii) Damages for breach of contract.
(iv) General damages.
(v) Costs on solicitor client basis.
(vi) An injunction restraining the defendants from disposing its assets until the final determination of this action.
(vii) Such further and/or other relief as the Court deems just and expedient.

31. For the failure of the Defendant to file a statement of defence, the Plaintiff entered final judgment in the sum of $558,679.70 and interest at the rate of 13%.

32. Order 19 deals with default of pleadings. The interlocutory judgment appears to have been filed under Order 19 rule 6 which deals with default in the filing of a defence where there is a mixture of claims, all of which are of the kind in rr. 2 – 5 of this Order. Where the claim is for both liquidated demand and unliquidated damages, a default in the filing of a defence under this rule entitles the Plaintiff to enter final judgment for the liquidated claim, and interlocutory judgment for unliquidated damages to be assessed.

33. The term "liquidated demand" is not defined in the High Court Rules. However, in _Devi v Anthony_ [2001] FJLawRp 4; [2001] 1 FLR 28 (12 January 2001), Byrne J said:

> There are several authorities on what constitutes a liquidated demand but the most relevant which I have been able to discover was the statement of Farwell, L.J. in ***Lagos v Grunwaldt*** [1910] 1 KB 41 at page 48 who said that a liquidated demand was where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated.

34. The Court of Appeal in _Mishra v Car Rentals (Pacific) Ltd_ [1985] FJLawRp 12; [1985] 31 FLR 49 (8 November 1985), referred to _Knight v. Abbott_ (1882) 10 QB 11 where it was held:

> A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under a contract. Its amount must be ascertained or ascertainable as mere matter of arithmetic.

35. Reference was also made to the dictum in _Workman Clark & Co. Limited v. Lloyd Brazileno_ (1908) 1 KB 968 (CA) that

> A claim is unliquidated, where even though specified or named as a definite figure, its ascertainment requires investigation beyond mere calculation.

36. In _Paterson v Wellington Free Kindergarten Association Inc_ (1966) N.Z.L.R. 468 at 471, Barrowclough CJ stated:

> In my opinion there can be no doubt that, in deciding whether a demand is liquidated, important factors are that it be capable of arithmetical calculation and that no investigation of the amount claimed should be necessary other than inquiry as to well established scales of charges…

37. In this case, the Plaintiff's claim is not only for breach of contract on account of work not done and monies advanced under a contract. It is also for damages for losses incurred as a result of what the Plaintiff pleads was the failure of the Defendant to perform its obligations under the contract.

38. The issues are whether these are capable of arithmetical calculation and without a need for investigation, or whether more is required in order to decide it. In my opinion, much more evidence is required to decide the precise amount of the damages and losses pleaded. The Plaintiff's claim is not only for a debt on account of monies advanced (the amount of which in any event requires further investigation and is not a mere matter of calculation), but also for damages and losses.

39. In *AE Consulting Pty Ltd v Online Valuations Pty Ltd* [2012] NSWSC 1300 (24 October 2012) Scholl stated:

> The mere fact that calculation can be made of the precise amount of damages that are alleged to be payable does not convert what is a claim for damages into a claim for a liquidated sum.

40. On the Plaintiff's claim, Order 19 rule 6 entitles the Plaintiff to a final judgment on a claim for liquidated demand and interlocutory judgment for damages to be assessed. The default judgment entered is in breach of rules 2, 3, and 6 of Order 19. In addition, the judgment for 13% interest is not in accordance with Order 13 rule 1 (2) which provides that interest shall be computed from the date of the writ to the date of entering judgment at the rate of 5 per cent. While the error in interest may not, of its own, result in setting aside, I am of the firm opinion that the default judgment is irregular and ought to be set aside as a matter of right.

Costs

41. In *White v Western* 2 Q B 647, the Court stated:

> …where there is an irregularity in the entry of default judgment the party against whom judgment is obtained is entitled to have the judgment set aside and the Court should impose no terms whatsoever on him, not even contingent term such as that the costs should be costs in the cause.

42. For all of the above, the orders of the Court shall be:

1. The default judgment entered 5 December 2018 is hereby set aside.
2. The Defendant is to file and serve a statement of defence on or before 15 May 2020.
3. A reply, if one, to be filed and served on or before 29 May 2020.

Dated at Labasa this 5th day of May 2020.

S.F. Bull
Master