

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**ORIGINAL JURISDICTION**

**CASE NUMBER:** ERCC 07 of 2015

**BETWEEN:** **GABRIEL SEBASTIAN ASH**  
**PLAINTIFF**

**AND:** **FIJI NATIONAL UNIVERSITY**  
**1<sup>st</sup> DEFENDANT**

**AND:** **RAM KARAN**  
**2<sup>nd</sup> DEFENDANT**

*Appearances:* Mr. A. Pal and Ms. S. Naidu for the Plaintiff.

Ms. M. Rakai for both the Defendants.

*Date/Place of Judgment:* Monday 22 November 2021 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

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**RULING**

*(Setting Aside Default Judgment and Security for Costs)*

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***Cause***

1. The defendants have brought two applications to the Court. The first is an application to set aside the default judgment and the second is for the plaintiff to pay the security for costs since he does not reside in the country anymore. Both the applications are defended by the plaintiff.

***Salient Facts***

2. The plaintiff filed a writ of summons on 08 September 2015. The writ was served on 9 September 2015. An acknowledgment of service was filed on 16 September 2015. The statement of defence was filed on 5 October 2015. The time for service of the statement of defence expired on 7 October 2015.
3. Until 7 October 2015, the defendants had not served the statement of defence. A search and praecipe for default judgment was filed on the 7 October 2015. The Plaintiff's counsel Mr. A Pal was informed by the Registry that there was a statement of defence filed but he insisted that since that was not served on him, his default judgment ought to be accepted.
4. The registry subsequently entered default judgment as follows:
  - a. \$900 for breach of first employment contract;
  - b. \$21,715.83 as unpaid wages under the second employment contract;
  - c. \$136,921.26 for breach of the 2<sup>nd</sup> employment contract or for repudiation of the same;
  - d. General and exemplary damages to be assessed;
  - e. Interest to be assessed by the court;
  - f. Post judgment interest; and
  - g. Costs to be taxed.
5. The plaintiff was served with the statement of defence on 8 October 2015. The service was refused on the grounds that it was served late.

***Findings***

6. In my calculation the statement of defence was due for filing and serving by 7 October 2015. The rule requires service of the defence before expiration of 14 days from the time limited for filing of acknowledgment of service.
7. The statement of defence was filed on time and the plaintiff knew about this. Having known that a statement of defence was filed, I am surprised that before the expiration of 14 days' time

allowed for filing and service, the plaintiff rushes to search the file and file a praecipe to file the default judgment.

8. The plaintiff very well knew that this matter is defended. I know and acknowledge that the defence was not served on time but if the plaintiff was genuine in getting his rights properly and quickly vindicated, the least I expected was some courtesy to at least ask the defendant's solicitors why the statement of defence was not served and warning that if there was any delay, default judgment would be filed.
9. On the principles of access to justice, both parties must have the right to be heard and nothing equates to a judgment delivered on merits after both parties are heard. The purpose of default judgment is not to acquire judgment without wanting to proceed to trial. The conduct of the plaintiff's solicitors indicate that somehow there is so much urge and desire to maintain the default judgment without wanting to establish the claim.
10. I find that there is no prejudice at all for the plaintiff if the judgment is set aside given the fact that there is no inordinate delay in serving the statement of defence and that the default judgment will not put an end to the litigation.
11. The plaintiff still has to proceed to hearing for assessment of damages and the defendants will not be denied that right. If a trial has to take place for assessment of damages, it is only proper that the aspect of liability be vindicated.
12. I also find that the judgment entered for the amounts identified in paragraph 4 above needs to be established on evidence. Just because a figure has been provided does not mean that the amount is liquidated. I need to hear evidence on how the amount is made up of. To that end I find that the judgment entered for specific amounts identified in paragraph 4 of the judgment is irregular but that does not mean that the judgment on liability is irregular. What follows is that if I were not to set aside the judgment on liability then the parties would have had to proceed for assessment but in my findings the defendants ought to be given a chance to meet the claim.

13. I also note that the causes of action against the second defendant is for assault and professional negligence. However, judgment has also been entered against him for the amounts stated in paragraph 4. I need to hear evidence as to why these amounts are laid at the 2<sup>nd</sup> defendant's door.
14. I now turn to the application for security for costs since the plaintiff is abroad. The defendants are seeking a sum of \$100,000 since the claim is more than two million dollars. The defendants say that the estimated costs that the defendant's will have to pay to its solicitors would be approximately \$50,000.
15. There is no dispute that the plaintiff is in Australia. There is no evidence that he is impecunious. He is an educated person and I expect that since leaving Fiji, he would be earning for a living. If there is any order for payment of security for costs, that would not stifle his right to proceed with the claim.
16. I am however very concerned about the application for the amount of \$100,000 to be paid. First there is no bill of costs attached to the application showing that the proceedings would cost the defendants that amount and secondly there is no evidence before me that this would be one case where the court should order indemnity costs against the plaintiff for which such a large sum of money for security is sought.
17. If there is any order for costs, it would be normally be in the vicinity of \$3,000 to \$5,000. I find that if the plaintiff is not successful in his claim, there would be some costs orders against him and since he is not in this jurisdiction, any enforcement proceedings will incur costs as well. It is therefore only fair that a reasonable sum in the form of security be paid in Court or in his lawyers trust account.

***Orders***

18. For the reasons stated above, I grant the following orders:

*a. The default judgment entered against the defendants is set aside.*

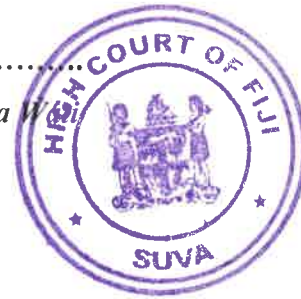
- b. *The plaintiff is to pay security for costs in the sum of \$5,000 within 21 days. The payment can be made either at the Court or the trust account of AP Legal in which case a copy of the receipt for the payment must be filed in the proceedings.*
- c. *Upon consultation with the counsel I will give directions on the progress of the matter.*

*Anjala W*

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*Hon. Madam Justice Anjala W*

*Judge*

*22. 11. 2021*



To:

1. *AP Legal for the Plaintiff.*
2. *Messrs Sherani & Company for the Defendants.*
3. *File: ERCC 07 of 2015.*