

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 155 OF 2019**

**BETWEEN** : **TF JAN BULLDOZING COMPANY PTE LIMITED**  
**Respondent/Plaintiff**

**AND** : **FIJI ROADS AUTHORITY**  
**Appellant/Defendant**

**Appearances** : **Mr V Maharaj for the Respondent/Plaintiff**  
**Mr S Fatiaki for the Appellant/Defendant**

**Hearing** : **19 April 2024**

**Judgment** : **7 June 2024**

**JUDGMENT**

(Appeal from Interlocutory Decision by Master)

[1] The Fiji Roads Authority (FRA) appeals from the Master's decision dated 25 April 2023 granting leave to TF Jan Bulldozing Company PTE Ltd (TF Jan) to enter Interlocutory Judgment against FRA.

[2] FRA did not file a Statement of Defence within the time prescribed in the High Court Rules 1988. Accordingly, TF Jan filed a summons for default judgment and the same was granted by the Master. FRA takes issue with the decision of the Master. TF Jan, on the other hand, contends that FRA has no defence and, as such, TF Jan should be entitled to its interlocutory judgment.

**Background**

[3] This proceeding was commenced in 2019 with a Writ of Summons. The Writ was subsequently amended on 6 June 2019. According to the pleadings, there is a related criminal case that preceded the present proceeding, being HAC 349/2013. This

proceeding was concluded in June 2015.<sup>1</sup> The pleadings also refer to a related civil proceeding, being *FICAC v Mohammed* [2018] FJHC 1016 (18 October 2018)<sup>2</sup>. Hamza J issued a decision in this proceeding determining that TF Jan's claim against FRA should be dealt with in separate civil proceedings. TF Jan obliged by filing the current proceedings in 2019.

[4] TF Jan pleads that between 2011 and 2013 it contracted with a third party, MWH, who was an agent and servant of FRA, to supply FRA with materials as well as equipment for hire. TF Jan pleads that it also constructed a bridge and road in Ba for FRA. The alleged breaches and damages sought are as follows:

- i. **Breach of contract WSC 149/2011:** TF Jan supplied materials for FRA from October 2012 to October 2013 but did not receive payment for the materials. It seeks the outstanding payment, loss of profit, interest on the delayed payment and loss of income for equipment that was unable to be used by TF Jan. The total amount sought is \$2,069,921.65.
- ii. **Breach of contract CTN 73/2011:** TF Jan was awarded a tender for the period from 2011 to 2013. It stockpiled and extracted material ready to supply FRA but FRA did not order the material. This led to a loss of income for the material not ordered. It seeks payment for these materials plus interest in the amount of \$1,191,313.64.
- iii. **Breach of contract CTN 14/2011:** TF Jan was awarded a tender for FRA to hire its drilling machine between 2011 and 2013. FRA did not use the drilling machine but used a drilling machine from another company. This led to a loss of \$66,122.59.
- iv. **Breach of contract CTN 97/2011:** TF Jan was awarded a contract for the supply of pavement materials. TF Jan pleads that FRA retracted the contract as TF Jan was about to mobilize on site, leading to a loss in profit and interest in the amount of \$487,581.82.

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<sup>1</sup> See *FICAC v Mohammed & Ors* [2015] FJHC 457 (22 June 2015) & *FICAC v Mohammed & Ors* [2015] FJHC 479 (24 June 2015).

<sup>2</sup> HBM 65 of 2016.

v. **Construction of Bridge:** TF Jan constructed a bridge and road in June 2012 following flooding in Ba. It sought reimbursement for these costs under a ‘Claim Back’ scheme advertised by FRA in January 2013, plus interest. The amount sought is \$871,299.37.

vi. TF Jan also seeks judgment interest and the costs of the proceeding.

[5] FRA was served with the amended pleadings on 7 June 2019. On 11 June 2019, FRA filed and served an Acknowledgement of Service expressing its intention to contest the proceedings. By the Master's calculation, FRA was required to file its Statement of Defence by 4 July 2019. It did not do so.

[6] On 3 September 2019, TF Jan filed a Summons for Leave to Enter Interlocutory Judgment under O.19, r.2 of the High Court Rules. The affidavit in support by Faiz Javed Jan (a Director of the Plaintiff company) set out the basis for the Summons. Mr. Jan stated that FRA had failed to file its defence and, therefore, TF Jan sought interlocutory judgment and costs.

[7] The Summons appears to have shaken FRA into action. It filed an affidavit in opposition by its in-house solicitor, Mr. Roniel Prakash, dated 17 October 2019. Mr. Prakash deposed that upon receiving TF Jan's Amended Statement of Claim, he searched FRA's internal records and could only find records for contract number WSC 149/2011 and not the four other claims. He stated that he then sought information from TF Jan's solicitors but that this had not been supplied. As such, FRA apprehended that their inclusion in this proceeding was a mistake. Mr Prakash further deposed that FRA attempted to file a Statement of Defence but the period to do so had expired and TF Jan had already filed its Summons. Mr. Prakash stated that FRA *‘is most apologetic to the Honourable Court and is willing to pay a reasonable cost to the plaintiff’*.

[8] Mr. Prakash proceeded to set out what he considered were reasonable defences to TF Jan's claim. The defences included:

i. A bar under the Limitation Act;

ii. FRA is not a party to the contract with TF Jan;

- iii. The *'standard practice for the Defendant [is] that all its contracts have arbitration clauses as a means of a dispute resolution'*.
- iv. Any grant of interlocutory judgement would be a miscarriage of justice. Mr Prakash stated, *'I respectfully request that the Plaintiff's Summons be set aside and for the Defendant to file a Statement of Defence as there are triable issues which ought to be determined'*.

[9] Mr Faiz Jan executed an affidavit in response for the Plaintiff dated 29 November 2019. He deposed:

- i. With respect to Mr Prakash's assertion that he sought information from TF Jan's solicitor regarding the claim, Mr Jan stated that there was only one such occasion and it occurred on 17 September 2019 after the time had already expired to file a Statement of Defence.
- ii. Mr. Jan stated that FRA had not provided any legitimate reason for the delay filing a defence, and that FRA ought to have observed the prescribed timeframes under the High Court Rules.
- iii. Mr. Jan stated that FRA ought to have sought leave to file its defence late, but, in any event, the reasons offered by FRA did not warrant the setting aside of the Summons or constitute reasonable grounds to object to the Summons.
- iv. Mr. Jan disputed the proposed defence under the Limitation Act as well as the suggestion that arbitration was mandatory in the contract. With respect to the latter, Mr Jan noted that in the absence of FRA having possession of the contract this was no more than an assumption by FRA.
- v. Annexed to Mr Jan's affidavit is a copy of the decision by Hamza J dated 18 October 2018 in Civil Action Number HBM 65 of 2016. This case involved a civil claim brought by the Fiji Independent Commission Against Corruption (FICAC) against Feroz Jan Mohammed. The Plaintiff company and FRA were joined as interested parties in the 2016 proceeding (along with seven other interested parties). According to Justice Hamza's Judgment, Mr. Mohammed had previously been found guilty following a defended trial and convicted of offences in relation to bribery of public officials contrary to s 134(1) of the Crimes Act, obtaining a financial advantage contrary to s 326(2), and perverting

the course of justice contrary to s 190(e). FRA was the complainant in the criminal action for which Mr Mohammed was convicted. FICAC filed separate civil proceedings seeking forfeiture of the alleged proceeds of crime. FICAC alleged that Mr Mohammed, TF Jan (and certain other interested parties) owed monies to FRA of more than \$3.1 million. The matter before Hamza J was a Notice of Assessment filed by TF Jan and another interested seeking a determination on their claim against FRA for a 'sum not exceeding' \$4 million to be set off against any monies ordered to be forfeited. The High Court struck out the Notice of Assessment, determining at [22]:

*...I am of the opinion that the questions or issues set out in the Notice of Assessment does not directly relate to the subject matter of this action, filed by the Applicant against the Defendant. It is the opinion of this Court that the issues raised in the said Notice of Assessment relates to separate causes of action which should be adjudicated in separate proceedings.*

[10] The learned Master issued a decision on the Plaintiff's summons on 25 April 2023. After setting out the background, the learned Master stated:

8. *Though certain aspect of the claim is liquidated, claim, but claim for loss for profit were not agreed for between the parties. Furthermore, the statement of claim does not outline how the interested claim was calculated. Hence a final judgment cannot be entered on the plaintiff's claim.*
9. *What the Plaintiff could have done was enter an interlocutory judgment for damages to be assessed. I fail to understand why it was required to make a formal application for leave to enter judgment.*

[11] The learned Master proceeded to determine:

10. *Hence leave is granted for interlocutory judgment to be entered and damages be assessed.*

*11. Since the Plaintiff ought to have entered interlocutory judgment with damages to be assessed, I make no orders for costs.*

[12] There followed an application by FRA for leave to appeal the Master's decision. The supporting affidavit from FRA, executed by Sonal Goundar on 8 May 2023, annexed FRA's Proposed Statement of Defence.<sup>3</sup> FRA's proposed defences include that it is not a party to three of the four contacts pleaded by TF Jan, the remedial works to the Ba bridge and road were not performed under any contract or agreement and the claims by the Plaintiff are barred by the Limitation Act.

[13] Mansoor J. issued a decision on 2 February 2024, granting leave and staying the decision of 25 April 2023. His Lordship's reasoning, reads, in part, at paragraph 10:

*The amounts claimed by the respondent are substantial sums and are resisted by the applicant. The parties have raised matters of law that must be gone into. The delay has been explained as an oversight on the part of an employee. The granting of leave will cause some degree of prejudice to the respondent, but that can be compensated by the awarding of costs in appeal.*

### **Parties Positions**

[14] FRA advances five grounds on appeal. They are summarized as follows:

- i. Grounds 1 and 2 pertain to the form of the Summons by TF Jan. TF Jan had sought default judgment under O.19, r.2, for liquidated damages. FRA contends that the damages here include unliquidated damages, and, therefore, r.2 should not have been used. FRA contends that the learned Master failed to appreciate this.
- ii. Grounds 3 and 5 relate to the reasoning and analysis by the learned Master. FRA contends that there was a failure to provide proper reasoning or analysis, and a failure to consider FRA's defences or the affidavit from Mr Prakash.

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<sup>3</sup> Annexure 'SG 2'.

iii. Ground 4 provides that the learned Master failed to consider FRA's '*legal arguments and submissions relating to the Limitation Act 1971 and Common Law Separate Entity Principle*'.

[15] Mr Fatiaki argues that the Plaintiff's Summons of 3 September 2019 ought to have been made under O.19, r.3. Further, there was no need for the Plaintiff to seek leave of the court. Relying on the decision by Amaratunga J in *Sodexo Laos PVT Sole Co v Dewan* [2011] FJHC 655 (12 October 2011), Mr Fatiaki argues that the use of the wrong rule in the High Court Rules is fatal where the damages are for unliquidated sums. As with *Sodexo*, the Master should have dismissed the Plaintiff's Summons on the basis that it was irregular, and instead timetabled the filing of FRA's Statement of Defence.

[16] Mr Fatiaki contends that there will be a substantial injustice to the Defendant if the Master's decision is not set aside.

[17] Mr. Maharaj argues that that the Defendant is too focused on the procedure. Notwithstanding, he states that FRA overlooks its own procedural breaches. He stated:

i. FRA did not file its statement of defence within the prescribed time. FRA should have filed a Summons to seek an extension of time to file its defence, but it did not do. It simply filed an affidavit in opposition to the Plaintiff's Summons.

ii. The learned Master was aware that r.2 was not the correct provision.

iii. The learned Master correctly granted interlocutory judgment under O.19, r.3.

[18] With respect to FRA's complaint that there is an absence of reasoning or analysis by the learned Master, Mr Maharaj states that the only issue before the Master was the summons for default judgment and not any extension of time to file the defence. Given no defence had been filed, the issue for determination was narrow and straightforward.

[19] Moreover, Mr Maharaj argues that there is no injustice to the Defendant as the Defendant as no reasonable defence.

## Decision

[20] FRA has filed an appeal from the learned Master's decision of 25 April 2023, granting leave to TF Jan to enter interlocutory judgment (with damages to be assessed). FRA contends that the learned Master erred in several respects. The appeal is brought under O.59, r.8 of the High Court Rules, leave having been granted by Mansoor J.

[21] This proceeding was filed in May 2019. FRA should have filed its Statement of Defence in July 2019 but overlooked doing so and sought to file it two months later. By this time, the Plaintiff had filed its Summons seeking default judgment. Given the amounts involved and the material before the Master, there was good reason for the Master to exercise the discretion under O.3, r.4(1) & (2) to extend the time for FRA to file a defence. Banuve J explained the principles applicable to the exercise of this discretion in *Chand v Chand* [2024] FJHC 258 at 20:<sup>4</sup>

*The provision vests a discretion on the Court on whether or not to extend time to allow the First Defendant to file a defense. This Court in cases such as Veilave v Naicker - Civil Action HBC 159 of 2013 and Rabendra Kumar v Praveen Kumar & Others - Civil Action HBC 163 of 2015 (per Amaratunga J) have comprehensively restated **the factors governing the exercise of the discretion at common law**, and it is not necessary to restate them, other than to acknowledge that they **are not exhaustive and cannot be rigidly applied so as to deny a party its right to come before the Court, and in the interests of justice. it has also been asserted that the paramount consideration for the exercise of discretion is merit, though an explanation to delay is needed.***<sup>5</sup>

[22] The learned Master did not do so because the Defendant failed to regularize its own failure by formally applying for an extension under O.3, r.4 and the Plaintiff persisted with its obviously defective Summons.<sup>6</sup>

[23] As a consequence, some five years later this Court is dealing with an appeal from the Masters's decision on an interlocutory ruling. The matter should now be ready for trial of the substantive dispute yet, instead, the case is bogged down with argument over

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<sup>4</sup> Footnotes are not included.

<sup>5</sup> My emphasis.

<sup>6</sup> I note from the learned Master's court notes that on 26 September 2019 FRA offered to pay costs to the Plaintiff for its delay but TF Jan declined, instead preferring to pursue default judgment.



what each party ought to have done in 2019. It is time to place the proceedings back on track.

[24] Dealing, briefly, with the respective arguments of the two parties:

- i. I agree with Mr Maharaj that it is self-evident from paragraphs 8 and 9 of the learned Master's decision that she was aware that the Plaintiff's Summons was defective in its reliance on O.19, r.2.
- ii. While the learned Master does not expressly mention O.19, r.3, it is apparent from paragraph 9 that she recognized that the Summons ought to have been made under r.3.
- iii. However, if the learned Master was prepared to rectify the Plaintiff's procedural defect then the learned Master ought to have also considered enlarging the time for the Defendant to file a defence. There is no discussion of any of these matters in the Ruling. Given the relatively short delay by the Defendant, and the Defendant's acknowledgement that it was prepared to pay costs for its transgression, the sensible outcome was to grant an extension but award costs to the Plaintiff for the unnecessary costs associated with its Summons.
- iv. I do not agree with the Plaintiff's assertion that the Defendant's case on appeal is entirely procedural and that its defence on the substantive claim is devoid of any merit. While I found Mr Prakash's affidavit to be unhelpful, Mr Mohammed's affidavit in reply, and in particular the annexing of Justice Hamza's 2018 decision was illuminating. It throws up significant red flags that ought to have caused the learned Master to pause before making an order that effectively denied FRA its right to defend the claim. The content of Justice Hamza's decision placed the Master on notice that there was a lot more to the dispute than a mere failure by the Defendant to pay for materials and/or services rendered. For example, Justice Hamza refers to criminal proceedings that concluded on 22 June 2015 when Feroz Jan Mohammed (and others) were found guilty of certain offences. The Sentence Ruling of 24 June 2015 makes it plain that Mr Mohammed was described as having ownership in TF Jan and that in 2012 Mr Mohammed (through TF Jan) dishonestly invoiced, and obtained payment from, FRA in the amount of \$3.132 million.<sup>7</sup> This fraud was

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<sup>7</sup> *FICAC v Mohammed* [2015] FJHC 479 (24 June 2015).

committed during the time that TF Jan says it is owed approximately \$4.5 million from FRA.

- v. The fact that there is no discussion of these matters, or any of the affidavit evidence, in the learned Master's decision is, of itself, a basis to allow the appeal.

### **Conclusion**

[25] In my view, the learned Master erred in the following respects with her decision of 25 April 2023:

- i. The learned Master failed to consider the consequences of the Plaintiff's defective Summons of 3 September 2019.
- ii. Although there was no formal Summons before the Master to enlarge time to file a Statement of Defence, the matter was raised by FRA in its affidavit in opposition. Both parties filed evidence on the matter. FRA expressly sought an order in its written submissions dated 16 March 2020 seeking leave to file a Statement of Defence.<sup>8</sup> As such, the issue was squarely before the learned Master for determination. The learned Master failed to consider the issue.
- iii. The learned Master also failed to provide any reasoning or analysis for granting interlocutory judgment. In light of the defects with the Summons and the evidence before the Master it was necessary that the Master address whether it was in the interests of justice to deny FRA an opportunity to defend the claim. In my view, the information available to the learned Master was more than sufficient to justify granting an extension of time to the Defendant to file a Statement of Defence.

[26] The significant sums in dispute, the relatively short delay by the Defendant and the obvious red flags from the previous criminal proceedings cumulatively warranted the court exercising its discretion to enlarge the time. The delay by the Defendant filing its defence certainly justified an award of costs against it and some strict timetabling conditions but it was clearly in the interests of justice to permit the Defendant an opportunity to defend the claim.

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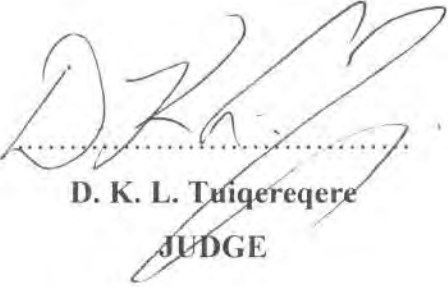
<sup>8</sup> At para 29.

## Orders

[27] I make the following orders:

- i. The appeal is allowed. The learned Master's decision of 25 April 2023 is quashed and set aside.
- ii. The Plaintiff's Summons to enter Interlocutory Judgment is dismissed.
- iii. The Defendant is granted an extension of time to file its Statement of Defence to the Plaintiff's Amended Statement of Claim dated 5 June 2019.
- iv. The Defendant is to file and serve a Statement of Defense by 21 June 2024.
- v. Costs are summarily assessed in the amount of \$2,000 to be paid by the Defendant to the Plaintiff within one (1) calendar month.



  
D. K. L. Tuiqereqere  
JUDGE

**Solicitors:**

Vijay Maharaj Lawyers for the Plaintiff/Respondent