

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. **HBC 171** of **2015**

BETWEEN : **DILIP JAMNADAS** as Principal and as Trustee of Jamnadas and Associates Trust Account, a legal practitioner of the law firm of Jamnadas and Associates, having its registered office situated at 6th Floor, FNPF Place, Victoria Parade, Suva, Fiji.

PLAINTIFF

AND : **RENEE DEVINA SINA LAL** of 73 Navurevure Road, Suva, Fiji.

DEFENDANT

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Ms. Fong M.** for the Plaintiff/Respondent

Mr. Bale A. for the Defendant/Appellant

DATE OF JUDGMENT: 7th August, 2024

JUDGMENT

[Summons seeking for Stay and Setting Aside of Default Judgment entered against the Defendant on 27/05/22]

On the outset, it is noted that the substantive proceedings was filed and commenced in Court on 01st May 2015. Some 09 years had lapsed and the substantive matter was finally disposed off by entering of Default Judgment against the Defendant on 27th May 2022. Currently an Interlocutory application is filed by the Defendant seeking for Stay and setting aside of Default Judgment entered against the Defendant on 27th May 2022.

Introduction

- (1) The Defendant/Appellant filed Summons on 05th September 2023 together with an affidavit in support and sought for the following orders:
 1. That there be a stay of execution of the Order entered against the Defendant on 27th May 2022.
 2. That the Order granted on 27 May 2022 so entered against the Defendant be set aside and the Defendant be given unconditional leave to file the Statement of Defence out of time and defend the within action.
 3. That the Bankruptcy proceedings being Bankruptcy No. 13 of 2023 be stayed pending the determination of the setting aside application.
 4. An Order for costs of this application on an indemnity basis; and
 5. Any other Order which this Court may deem just and necessary in the circumstances.
- (2) The application is made pursuant to Order 19 Rule 9, and Order 45 Rule 10 of the High Court Rules 1988 and under the inherent jurisdiction of this Honourable Court.
- (3) The Plaintiff/Respondent filed its Affidavit in Opposition and subsequently the Defendant/Appellant filed a Reply.
- (4) Both parties to the proceedings furnished Court with their respective written submissions and argued the application accordingly.

Appellant's/ Defendant's Contention

- (5) The Default Judgment Order granted on 27th May 2022 is irregular.
- (6) The Defendant has a meritorious Defence and there are triable issues to be determined.
- (7) Default Judgment granted on 27th May 2022 was on an Ex-Parte basis and is defective.
- (8) No leave to enter default Judgment was made.
- (9) The Plaintiff's Amended Claim for Fraud is required to be formally proved.
- (10) The Plaintiff's claim for Breach of Fiduciary Duty and Breach of Trust is statuted barred.

The Respondent's /Plaintiff's Contention

- (11) The application for Default Judgment was properly made under Order 19 Rules 6 and 7 and there was no requirement to serve the application on the Defendant/Applicant.
- (12) The Defendant's intention are beyond his knowledge and had failed to file/serve any Statement of Defence after being served with the Plaintiff's amended Writ and Claim on 21st March 2019, despite filing and serving Amended Acknowledgement of Service on 04th April 2019 and knowing full well the consequences of not filing a Statement of Defence.
- (13) The Defendant says that filing a Statement of Defence would have defeated the purpose of her striking out application. The Defendant should have known that such an application does not stay the requirements for filing a Statement of Defence. The Defendant could have included in her application for striking out the Plaintiff's claim that a stay be granted, and leave sought to file a Statement of Defence out of time in event of strike out application was dismissed - yet the Defendant failed to do so.
- (14) The Defendants solicitor, Ms. Seduadua was in Court when Plaintiff's application for Default Judgment was heard on 26th May 2022 and adjourned to 27th May 2022 when Default Judgment was granted by the Court against the Defendant.

- (15) The Judgment of 27th May 2022 is clear and Order 1 does not mean that the Plaintiff is now entitled to get Judgment - however, Plaintiff was given. Leave to enter Default Judgment in the sum of \$27,170.04.
- (16) Plaintiff denies any assertion that the Judgment is null and void of 27th May 2022.
- (17) The Defendant's application for stay and setting aside Default Judgment to be dismissed.

Determination

- (18) The substantive Writ Action was filed on 01st May 2015 and remain impending in the Court system for a period of 09 years until its disposition on 27th May 2022 by entering Default Judgment against the Defendant for the liquidated sum accordingly.
- (19) The Defendant was served with the Writ of Summons and an Acknowledgement of Service was filed by the Defendant in 03rd May 2016. However, the Defendant did not file/serve any Statement of Defence.
- (20) Subsequently, the Defendant was served with an amended Writ of Summons on 21st March 2019.
- (21) The Defendant filed an Amended Acknowledgment of Service but failed to file/serve any Statement of Defence therein.
- (22) Even prior instances of leave being granted to the Defendant to file her Statement of Defence, yet failed to do so instead filed a strike out application seeking an order for the Plaintiffs Statement of Claim to be struck out..
- (23) The perusal of the Court file reveals that a number of interlocutory applications instead were filed by the parties to the proceedings; summons to strike out the Plaintiff's Writ and the Statement of Claim, Amendment to the Plaintiff's Writ Action, order 25 rule 9 application whereby the Court sought the Plaintiff to show cause why the Plaintiff's substantive Writ Action should not be struck out since a period of more than 6 months' time

period has lapsed and yet no action has been taken and or Order 3 Rule 5 application filed to proceed with the Action on the substantive action and so on.

(24) These interlocutory application in fact delayed the substantive cause of action to be completed and the file forwarded and allocated to a presiding judge to hear and determine the impending substantive action accordingly.

(25) The question and/or issue that this Court now needs to determine is:

"[1] whether the default judgment entered against the Defendant on 27th May 2022 on the Plaintiff's application is regular and correctly granted by the Court?
[2] If not, then the Default Judgment be stayed and set aside against the Defendant?"

(26) Order 18 Rule 2 [O 18, R2] of the High Court Rules 1988 provides that:

"2(1) Subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a Defence on a Plaintiff before the expiration of 14 days after the time limited for acknowledging service of the Writ or after the statement of claim is served onto him or her, whichever is the later."

(27) Rules of the Court as provided for have meaning and implications. Timeliness exist for a purpose. As was said in **Rajendra Prasad Brothers Ltd v Fai Insurance Fiji Ltd** [2002] FJHC 220, at 8; and **Bank of Hawaii v Reynolds** (1998) FJHC 82 at 6 adapting the principles from **Ratnam v Cumaraswamy and Anor** [1964] 3 All ER 933.

(28) The Rules of the Court must, *prima facie* be obeyed, and, in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, the party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

- (29) The evidence on the Court file reveals that the Defendant had only filed an Amended Acknowledgement of Service on 21st March 2019 to the Plaintiff's Amended Statement of Claim served on to her.
- (30) The Defendant had miserably failed to file and serve any application seeking for an extension of time and/or enlargement of time to file/serve a Statement of Defence if the Defendant thought she was running out of time period scheduled or provided for by the High Court Rules 1988? However, an application for extension of time was only filed and sought for on 24th May 2022 when the Plaintiff's summons seeking for Default Judgment was scheduled for hearing on 26th May 2022.
- (31) A period of 09 years has lapsed since the first filing of the substantive Writ of Action by the Plaintiff on 01st May 2015 and 05 years lapse of time from the service of the Plaintiff's amended Writ Action.
- (32) The delay in not filing any Statement of Defence within the Rules Order 18 Rule 2 of the High Court Rule 1988 tentamounts to an inordinate delay on the part of the Defendant and is in breach of the Rules dealing with the pleadings in the impending Civil cases.
- (33) Further, the Defendant filed its current application seeking for stay and setting aside of Default Judgment after a lapse of one (1) year and three (3) months after the Default Judgment was sealed and subsequently served onto the Defendant. Hence, unreasonable delay in filing of this application seeking for orders therein.
- (34) For the purpose of setting aside a Default Judgment, the Defendant must show that he has a **meritorious defence**.
- (35) The major consideration was 'whether the Defendant has disclosed a Defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false (*van v Awford* (1986) 834 LS Gaz 1725 refers).
- (36) In the ordinary way, the Court does not set aside a Judgment by default unless there is an affidavit showing a defence on the merits.

- (37) This does not mean that the Defendant must show a good defence on the merits, he needs only show to court a defence which discloses an arguable or triable issue.
- (38) In order to enable the Court to properly exercise its discretion, there are certain basic preconditions which have to be fulfilled by the Appellant/Defendant. They are:
- (i) Reasons why Judgment was allowed to be entered by default;
 - (ii) Applicant must be made promptly and without delay; and
 - (iii) An affidavit deposing to facts that show that the Defendant has a defence on merits [case of **Pravin Gold Industries Ltd v The New India Assurance Company Ltd** [2003] FJHC 298; HBC 0250d.2002s (4 February 2003) refers.
- (39) The Defendant's contention and explanation as to why the Judgment by default was allowed to be entered was that the Defendant after service of the Plaintiff's Writ Action and filing of Acknowledgment thought fit to file/serve an interlocutory application seeking for striking out of the Plaintiffs Writ Action and the Statement of Claim since it had no cause of action, statute barred and lacks pleadings of facts.
- (40) However, the Defendants striking out application after hearing was accordingly dismissed by the Court on 27th April 2022.
- (41) The Plaintiff then filed an Ex-Parte Notice of Motion on 19th May 2022 and sought for Judgment by Default against the defendant and was assigned a returnable date of 26th May 2022.
- (42) At this juncture, the defendant than reverted to file/serve a subsequent application to seek enlargement of time for leave to file/serve a Statement of Defence to the Plaintiff's Amended claim on 24th May 2022.
- (43) The Defendants summons (application) was remitted to Master for Directions. The Master wrote to The Senior Court Officer, High Court Civil.

'Will be short service if listed on 26th May 2022. Hold on for directions of the Court. Why wasn't the file brought up yesterday (24th May 2022)?'

*Acting Master
Signed
25/5/22*

- (44) It will be noted that the Defendant filed her Summons on 24th May 2022, only after the Plaintiff proceeded to file its Ex-Parte Notice of Motion and sought for a Default Judgment to be entered against the Defendant.
- (45) The Defendant's explanation as to filing of the setting aside default judgment application promptly and without delay states:

"The Default Judgment order was entered on 27th May 2022 and sealed on 06th June 2022, served onto my office on 15 June 2022. From 15th June 2022 to 03rd February 2023 is almost lapse of 07 months from entering of the Order to the filing of her application ...Order is defective in substance and null and void. There is no order to realise and/or enforce as Order no. 1 had only been granted leave and not a default judgment on the liquidated sum. Orders No. 2 to no. 4 automatically becomes null and void."

- (46) The Defendant admits a delay of 07 months timeframe from entering of the Default Judgment Order to the defendants filing of the setting aside default judgement application. A delay of 07 months is excessive and inordinate.
- (47) I find that the Defendant failed to file/serve his setting aside default judgment application promptly and/or without delay.
- (48) The defendant explains her affidavit annexed with the **'proposed statement of defence.'**
- (49) That she believes that it is sufficient that her defence only needs to disclose arguable and/or triable issues that would have some prospect of success at trial and/or even mitigate the Plaintiff's application on foot alleging 'Breach of Fiduciary Duty, Breach of Trust, Fraud,

Misappropriation' etc. and seeks relief of both liquidated and general damages which can only be determined at trial proper.

- (50) Upon the perusal of the Court Record of 26th May 2022 when the Court proceeded to hear the counsel representing the Plaintiff and Ms. Seduaduda representing the Defendant [at the record show and speaks for itself), the Plaintiff's counsel informed court that "she was abandoning the relief sought in prayers 3, 4, 5, 6 and 8 of the Plaintiff's summons.
- (51) At no time did the counsel representing Ms. Seduadua either made any observations and/or objects or informed of her clients (Defendants) status as to the application seeking for Default Judgement against the Defendant by the Plaintiff made to the Court.
- (52) Accordingly on 27th May 2022 the master delivered her decision and granted the entering of the Default Judgment against the Defendant in terms of the prayers (1) and (2) together with interest at 4% from 01st May 2015 till to date on the sum of \$27,170.04. She further ordered that the Plaintiff was also entitled to First Judgment interest at 4% until Judgment is satisfied.
- (53) It must be borne in mind that Order 1 rule 7 of the High Court Rules 1988, deals with "practices where no express provision in the rules".
- (54) Order 19 rule 7 clearly states that an application under paragraph (1) must be made by summons or motion; 'hence, there is no impediment on the Plaintiff to make the application Ex-Parte, as the Plaintiff did in the current case.
- (55) I make reference to the case of **Skerlec v Tompkins** - Interlocutory Judgment [2012] FJHC 1111; HBC 111.2008 (26 April 2012) at paragraph [40]:

"[40] Hence, I cannot see any rationale behind the requirement of serving the application for default judgment on the defendant when the defendant has already abstained from filing his statement of defence, because it would give the defaulting defendant another opportunity to delay the relief to the plaintiff, which in my view would frustrate the whole purpose of Order 19 rule 7. Thus, I am unable to construe that the objective of Order 19 rule 7 is to contemplate such a situation."

- (56) The Court also expressed the view that 'even if *order 19 rule 7* does not state as to the manner in which the application for default judgment ought to be made, it was the consideration of the court that such an application can be made Ex-Parte.
- (57) In the current case, when the Plaintiff sought for Default Judgment by Ex-Parte Notice of Motion, the Plaintiff withdrew all other orders/relief sought therein except for Orders sought at No. 1 and No. 2 accordingly which tentamounted to a liquidated claim altogether.
- (58) Further, when the Defendants striking out application was dismissed by Court, the counsel representing the Defendant had a client-lawyer relationship and should have taken obvious necessary steps in the circumstances to defend the claim against her, specially when the Defendant herself is a qualified lawyer and well acquainted with the rules and laws applicable herein.
- (59) However, the Defendant thought fit then not to make any attempt to seek for an enlargement of time and leave to filed and serve her statement of defence if she really had the desire to fight tooth and nail in order to have the substantive matter dealt with in a just and fair manner in accordance with the law accordingly.
- (60) *Section 15 of the Constitution of the Republic of Fiji* deals with "Access to Courts or Tribunals."
15. (2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.
- (3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time. (underline mine)
- (61) Bearing in mind the above rational and the time when the substantive action was begun on 01st May 2015 and the time period of 09 years that has passed by for the substantive action to be determined by entering Default Judgment against the Defendant, it is only just and fair that the Defendants summons seeking to stay and set aside the Default Judgment entered against the Defendant, order granted on 27 May 2022 be not acceded to, refused and dismissed.

In Conclusion

- (62) The Plaintiff's substantive Writ Action was filed on 01st of May 2015 and served upon the Defendant.
- (63) Subsequently, the Plaintiff amended its writ and Statement of Claim and served the Defendant with the same.
- (64) The Defendant filed an Amended Acknowledgment but abstained from filing/serving any Statement of Defence to counter the claim, instead filed a striking out application seeking for the Plaintiff's Writ Action to be struck out.
- (65) However, the Defendant's application was dismissed.
- (66) The Defendant made no application to stay or suspend the time required for filing of her statement of defence and hence the time continued to run according to the rules. Defendant failed to file/serve the required document within time, resulting in the Plaintiff filing his Ex-Parte Notice of Motion coupled with an affidavit in support and sought for an order for Default Judgment to be entered against the Defendant, orders sought at paragraph (1) and (2) accordingly.
- (67) The Plaintiff's Ex-Parte Notice of Motion was properly filed on 19th May 2022 seeking for Default Judgment against the Defendant in terms of the High Court Rules. The Defendant's application for enlargement of order dated 27th April 2022 and leave to file statement of defence was filed subsequent to the Plaintiff's Notice of Motion on 24th May 2022.
- (68) However no returnable date was assigned since the Plaintiff's Notice of Motion was scheduled for 26th May 2022.
- (69) This application of the Defendant was filed after a time lapse of 2 years period, 2 days prior to the Plaintiff's Notice of Motion scheduled with returnable date of 26th May 2022 and would have tentamounted to short service if the returnable date was assigned for 26th May 2022 since no application for abridgment of time was sought.

- (70) The severe delay of filing Defendant's Statement of Defence from the time the Plaintiff's substantive Writ of Action was filed on 01st May 2015 until the defendant finally making an application for enlargement and leave to file statement of defence, caused the substantive writ action from its disposition rather remained pending unnecessary in the system.
- (71) I find that the Default Judgement entered against the Defendant on the Plaintiff's application on 27th May 2022 is regular and correctly entered.
- (72) The Appellant/Defendant's Summons seeking for stay and setting aside of Default Judgement of 05th September 2023 hasn't passed the test in terms of the rules in order to allow this Court to accede to the Appellant/ Defendant's Application.
- (73) Accordingly, the Defendant's Summons filed on 05th September 2023 seeking for stay and setting aside of the order granted on 27th May 2022 is dismissed in its entirety.
- (74) Hence, the order for Default Judgment granted against the Defendant on 27th May 2022 stands and is effective.

Costs

- (75) Although the application proceeded to Full hearing by way of affidavit evidence, written and oral submissions, and bearing in mind the way this matter had proceeded all along since 01st May 2015 till the time of grant of Default Judgment against the Defendant, it is only fair that I order either party to the proceedings to bear their own costs at the discretion of this court.

Orders

- (i) The Defendants summons filed on 05th September 2023 seeking for stay and setting aside order of 27 May 2022 is dismissed in its entirety.
- (ii) The order for Default Judgment granted against the Defendant on 27th May 2022 stands and is effective.

(iii) Parties to this proceedings to bear their own costs at the discretion of this Court.

(iv) Filed Closed.

Dated at Suva this 07th day of August ,2024.



A handwritten signature in blue ink, appearing to be "Vishwa Datt Sharma".

Vishwa Datt Sharma
PUISNE JUDGE

cc: Lal Patel Bale Lawyers, Suva
Jamnadas & Associates, Suva