

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 206 OF 2021

BETWEEN:

GREEN PAK SUPPLIES (FIJI) PTE LIMITED a
limited liability company having its registered office
at Level 1, Car city Building, Navo, Nadi

PLAINTIFF

AND:

JOHN SOFIANOPOULOS of Amley Rise
Lysterfield VIC 3156, Australia.

1st DEFENDANT

AND:

**JIMM SOFIANOPOULOUS aka DIMITROIS
SOFIANOPOULOS** of Amley Rise Lysterfield VIC
3156, Australia

2nd DEFENDANT

BEFORE

: Hon. Mr. Justice Mohamed Mackie

APPEARANCES

: Ms. A. B. Swamy, for the Plaintiff

: Mr. A.K. Singh - for the 1st and 2nd Defendants

DATE OF HEARING

: 4th March 2024.

WRITTEN SUBMISSIONS : Filed on 4th March 2024 by both parties.

DATE OF RULING

: 12th February 2025.

RULING

Summons For Setting Aside Under Order

19 Rule 9

A. INTRODUCTION:

1. Before me is a Summons filed by the 1st & 2nd Defendants on 23rd July 2023, seeking, *inter alia*, the following reliefs.
 1. *That the interlocutory judgment dated 18th May 2023 entered against the Defendants be wholly and unconditionally set aside.*
 2. *That the Defendants be allowed 14 days to file a Statement of Defence and Counterclaim.*
 3. *That the Costs of this application be in the cause;*
 4. *That all execution in respect of Interlocutory Judgment be stayed pending the hearing and determination of this application.*
2. This Summons is supported by the Affidavit deposed by the 1st Defendant, namely. Mr. JOHN SOFIANOPOULOS as the Managing Director of EXTREAM SPORT FISHING (Fiji) LIMITED. The Affidavit accompanied annexures marked as “**JS-1**” to “**JS-20**”, which included an authority marked as “**JS-2**”, given to the deponent by the 2nd Defendant to swear the Affidavit on his behalf.
3. The Application is made pursuant to Order 19 Rule 9 of the High Court Rules, 1988 and the inherent jurisdiction of this Court. The Application is opposed by the Plaintiff and an Affidavit in opposition sworn on 12th October 2023, by Mr. PRAVEEN KUMAR, the General Manager of the Plaintiff Company, has been filed on 13th October 2023, together with annexures marked as “**A**” to “**D**”.
4. Both counsel representing the parties filed their written submissions as aforesaid and made oral submissions as well at the hearing held before me.

B. BACKGROUND FACTS:

5. The Plaintiff Company, having obtained Leave to issue proceedings and to serve the Summons out of jurisdiction on 29th September 2021, filed the substantive action against

the Defendants on 4th October 2021 by way of its writ of summons and the Statement of Claim, seeking *inter alia* the following reliefs.

- a) *Payment of the said Sum of \$ 115,978.00 (One Hundred Fifteen Thousand Nine Hundred and Seventy-eight Dollars).*
- b) *Interest on any monetary award.*
- c) *Damages.*

6. The Defendant filed the acknowledgment of service and the Notice of Appointment , on 10th November 2021, but failed to file and serve the Statement of Defence within the prescribed time period, which resulted in the filing of an Interlocutory Summons by the Plaintiff on 14th March 2022 and successfully obtaining the Default Judgment dated 18th May 2023 against the Defendants in a sum of Fiji \$ 115,978.00, with the interest at the rate of 6% and cost in a sum of \$1000.00,pursuant to Order 19 Rule 2 &3 of the High Court Rules.
7. There is no evidence in the case record in proof of the service of the default judgment on the Defendants, though the Court had ordered the same to be served on them forthwith, though the Defendants had their representation in Court during the time material.
8. It is upon the entering of the default judgment on 31st May 2023 as aforesaid, the Defendant's new Solicitors, who came on record on 21st June 2023, filed the current summons on 31st July 2023, seeking to set aside the default judgment. The Plaintiff filed its Affidavit in opposition on 13th October 2023 and the Defendants filed their reply Affidavit on 25th October 2023.
9. The hearing being taken up on 04th March 2024 and the written submissions of both parties being filed, now I have been called upon to pronounce the ruling on the Defendants' Summons for setting aside.

C. PRINCIPLES ON SETTING ASIDE A DEFAULT JUDGMENT.

10. Order 19 Rule 9 of the High Court Rule, 1988 deals with Setting Aside of Judgment and states as follows:

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

11. Under Or.19 R.9 the Court may set aside or vary 'any judgment' unconditionally or on terms. The Court has a very wide discretion in an application of this nature, but it is also guided by certain well-known principles.

One of the principles is 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". (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473).

12. The basic principles applicable to setting aside judgments in the exercise of Court's discretion are set out in **Halsburys Laws of England Vol 37 4th Ed. para 403**, inter alia, thus:

"In the case of a regular judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits ... For this purpose, it is enough to show that there is an arguable case or a triable issue"

It is further stated therein:

"There is no rigid rule requiring the applicant to explain why he allowed judgment to go by default, but nevertheless, at least in the case of a regular judgment, such explanation is obviously desirable to enable the court to exercise its discretion, especially as to any and if so what terms should be imposed".

13. A useful summary of the factors to be taken into consideration in setting aside is to be found under Notes to Or.19 r.9 of The Supreme Court Practice 1995 Vol 1 at 142 which inter alia states as follows:

"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred."

It goes on to further state as follows; -:

"The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., at p. 223, where the earlier cases are summarised. From that case the following propositions may be derived:

- (a) *It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus, the court must form a provisional view of the probable outcome of the action.*
- (b) *If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."*

14. Also on the subject of setting aside default judgment, in **Davies v Pagett (1d(1986) 10 FCR 226 at 232** a Full Court of the Federal Court of Australia said:-

"The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation. The problem of delays in the courts, egregious as it is, must be dealt with in other ways; for example, by disciplinary actions against offending practitioners and by a comprehensive system of directions, hearings or other pre-trial procedures which enable the court to supervise progress – and, more pertinently non-progress – in all actions".

15. In **Wear Smart Textiles Ltd v. General Machinery Hire Ltd [1998] FJHC 26; Abu00301998)** the Court of Appeal addressed the question of setting aside default judgment, by reference to the authorities including **Farden v. Richter [1889] LawRpKQB 79; (1889) 23 QBD 124; H v. Rson >> [1884] WN 77, reprinted&#ted 23 QBn; Richardson v. Howel0; (1883) 8 TLR 445; WatBarnett >[1878] UKLawRpKQB 21; (1878) 3 QBD 183;&; AlBulk Transport Co Inc Inc v. Saudi Eagle Shipping Co Inc, The Saudi Eagle [1886] 2 Lloy17;s R7;s Rep 331 (CA); and (19b>(1986) 83 LS1725; T25; The Times LR (23 April 1986).**

D. CONSIDERATION OF THE APPLICATION:

16. The Plaintiff's substantive claim filed on 04th October 2021 is on the alleged breach of the Memorandum of Understanding (MOU) and the Construction Agreement (CA) entered into between the Plaintiff Company and a Company called "Extreme Sports Fishing" being represented by the Defendants on the 12th September and 14th September 2019 respectively.

17. The Plaintiff alleges that when the said Company, namely, “Extreme Sports Fishing” had in fact been wound up, the Defendants made fraudulent representations that the said Company was in operation and induced the Plaintiff Company to enter in to the MOU and the CA and finally failed to pay a sum of \$115,978.00, and thereby the Plaintiff has suffered the said sum as loss and damages.
18. The Plaintiff moved to recover the said sum of \$115,978.00, together with interest on it, from the Defendants, who are, undisputedly, the Directors of the said Company.
19. The Defendants were, reportedly, served with the Writ of Summons and the Statement of Claim by the registered post, who in turn filed the Acknowledgement of service and the Appointment of their solicitors on 10th November 2021, but failed to file and serve their Statement Defence as was required of them as per the High Court Rules 1988. As a result, an interlocutory summons being filed by the Plaintiff on 14th March 2022, subsequent to the hearing of same on 30th September 2022, the impugned default Judgment was entered against the Defendants on 18th May 2023.
20. Currently, before this Court is the Summons filed and served by the Defendant seeking, *inter alia*, orders to set aside the Default Judgment entered on 18th May 2023, that the Defendants be allowed to file their Statement of Defence unconditionally, together with their Counterclaim, and costs of this application be costs in the cause.
21. There is no dispute between both parties that the Judgment in Default of Defence entered on 18th May 2023 against the Defendants for the sum of \$ 115,978.00 is a regular judgment.
22. The leading authority on an application setting aside the default judgments is the old English decision in ***Evans v Bartlam [1937] AC 473***. The primary and secondary considerations described in that decision have been approved and adopted in Fiji by the Court of Appeal in several decisions including the ***Fiji Sugar Corporation Limited v Mohammed Ismail [1988] 34 Fiji LR 75***; ***Wearsmart Textiles Limited v General Machinery Hire Limited and Shareen Kumar Sharma (unreported), Fiji Court of Appeal, Civil Appeal No. ABUO030 of 1997***, a decision dated the 29th of May, 1998 (their honors Sir Moti Tikaram, President; the right Honourable Sir Maurice Casey, and the Honourable Justice J.D. Dillon presiding) and more recently in ***Suva City Council v Meli Tabu (unreported), Fiji Court of Appeal, Civil Appeal No. ABUO055 of 2003*** delivered on the 16th of July, 2004. (Their honors Eichelbaum, Penlington and Scott).

The principles are:

- a. *As a primary consideration there must be before the court an affidavit from the defendant or associated person properly deposing and demonstrating a meritorious defence.*

- b. *As secondary consideration the affidavits and submissions must advance adequate reasons as to why the judgment was allowed to be entered by default.*
- c. *The affidavit and submissions must confirm that a substantive application was made promptly or explain with adequate reasons why there was a delay in making the application.*
- d. *The plaintiff should depose and submit in reply as to any prejudice or irreparable harm that will be suffered if judgment is set aside.*

23. The exercise of the discretion is wide and unfettered as until the Court has pronounced judgment upon the merits or by consent, it must have the power to revoke a default judgment obtained by a failure to follow any of the rules of procedure (Evans supra). Any defence described in the affidavits supported by the submissions must have a real prospect of success and carry a degree of conviction allowing the court to form a provisional view of the probable outcome of the action.

24. This requires the court to scrutinize the Defendant's affidavit to see whether it contains deposed facts which will support a meritorious defence that is one with a reasonable chance of success (***Wearsmart Textiles (supra), Suva City Council (supra) and Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyd's Reports 221***).

Why was Default Judgment allowed to be entered?

25. The Writ was issued by the Plaintiff on 4th October 2021 and the Defendants were, reportedly, served out of jurisdiction by handing over the same at Nadi Post office on 12th October 2021. The exact date on which it was served on them is not known to, except for the Defendants

26. Since the service was out of jurisdiction, the Defendant should have responded to it not later than 42 days from the said, purported, date of service on 12th October 2021. ie on or before the 26th of November 2021. However, the Defendants filed their Acknowledgement of service and the Appointment of Solicitors well in time ie on 10th November 2021, but failed to file their Statement of Defence.

27. Accordingly, on 14th March 2022, the Plaintiff filed the Interlocutory Summons for default Judgment and succeeded in obtaining the Default Judgment dated 18th May 2023, which was sealed on 6th June 2023, but not served on the Defendants despite being directed to do so.

The Defendants' explanation for failure to file the defence.

28. The 1st Defendant in the Affidavit in support for setting aside, inter alia, has averred the followings:

- a. *That he was in Melbourne, Australia and Melbourne was going for lock-down due to Covid-19, which prevented him from Travelling to Fiji and provide all documents to their Lawyers.*
- b. *He informed his former Layers to write to BSP Bank as they had all the evidence of the payments made to the Plaintiff, but they have not written to the Bank.*
- c. *He had no any idea about this kind of litigation and he was depending on his former solicitors, who had let him down.*

29. As per the case record, it appears that the Defendants and their former Solicitors have had a somewhat tainted relationship, owing to certain issues, on which the Defendants' former Solicitors were to file papers for withdrawal, however later decided to continue to act for them, but did not do so.

30. It has to be appreciated that the Defendants, being away from Fiji, on the receipt of the writ of summons and the Statement of Claim, had promptly caused their former Solicitors to file the Acknowledgement of Service and their appointment as Solicitors. This shows that they had a genuine intention to defend the action, and to make a Counter -Claim as well.

31. I find that the Defendants' explanation for the failure to file their Statement of Defence in time is convincing as to what led to the entering of the Default Judgment against them.

Any Delay in filing Setting Aside Application?

32. The Default Judgment was entered on 18th May 2023 and sealed on 6th June 2023. But it was not served on the Defendants. However, the Defendants, having retained their new Solicitors, filed their papers for setting aside on 31st July 2023. The time gap between the two events is not that wide for it to be inexcusable.

33. I do not find that the Defendants have delayed, rather were prompt in filing their application seeking for the Setting Aside of the default judgment entered against them on 18th May 2023.

Meritorious Defence?

34. The proposed Defence of the Defendants has been marked and annexed as "JS-20" to the Affidavit in Support deposed by JOHN SOFIANOPOULOS, the 1st Defendant, Director of the "Extreme Sports Fishing" with which the Plaintiff had entered into the Agreement and the MOU.

35. The 1st Defendant has not denied the entering into the MOU and the CA with the Plaintiff Company according to which the Plaintiff was to construct the Residential House for the Defendants.
36. The Defendants claim includes over payments to the Plaintiff and allegation of negligence, fraud, reckless and deceptive conduct on the part of the Plaintiff Company's Director, and I find that they intend to make a counter-claim in a sum of \$29,000.00 with interest from the Plaintiff.
37. The Defendants also intend to seek a declaration that the Contract entered was between the Plaintiff Messrs. Green Pak Supplies (Fiji) PVT Ltd and the Messrs. "Extreme Sports Fishing" and not with the Defendants.
38. The Defendants deny owing the Plaintiff any sum at all and conversely makes a counter claim as aforesaid. The Defendants also find fault with the Plaintiff for resorting to the Court, without proceeding for Dispute Resolution Process in terms of the CA.
39. Reference is now made to the Case of ***Fiji Sugar Corporation Limited (supra), Dhan Kaur v Karam Singh & Others, Lautoka High Court Civil Action No. 223 of 1993*** an unreported decision of his Honour Justice Lyons wherein he said-*"When a Defendant makes an application to set aside judgment, the onus is on him to put before the court evidence in proper form by way of an affidavit as to the factual elements of a meritorious Defence"*.
40. Bearing in mind these circumstances, in my view, it require the impugned judgment to be accordingly set aside (**Beale v Macgregor, 2 T.L.R. 311**). Although the judgment was regular but not on merits, there is an affidavit of merits i.e. an affidavit stating facts showing a substantial ground of defence [**Farden v Richter [1889] UKLawRpKQB 79; (1889), 23 Q.B.D. 124**].

On facts showing a defence the following statement of Lord Denning M.R. in ***Burns v Kondel (1971) 1 Lloyd's Rep. 554 at 555*** is apt:

"We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue."

41. Upon a careful perusal of the Draft Defence, Affidavit in Support, written and oral arguments together with the above rational, I find that the Defendants have explained in the Affidavit in Support and the Draft Defence as to what had transpired between the Plaintiff and the Defendant in terms of the Contract entered into on 14th September 2019 and hence has shown an arguable case before this Court. The contents of the material within the Draft defence justifies that leave ought to be granted to the Defendants to defend the claim and make their Counter-Claim accordingly.

42. I find that there are triable issues and/or arguable Defence that will have some prospect of success at trial and/or even mitigate the Plaintiff's claim. It must also be taken into consideration that the decision to enter Judgment by Default against the Defendant was not made on merits rather made on the Defendants' failing to file and serve their pleadings.

Will the Plaintiff suffer any Prejudice or irreparable harm on setting Aside Order?

43. The Substantive action was commenced on 4th October 2021. Service of the Writ was effected on the Defendant on 12th October 2021. On 18th May 2023 the default judgment was entered against the Defendants and sealed on 6th June 2023, but not served.
44. To date, the Plaintiff's Default Judgment sealed on the liquidated claim remains pending and unenforced in terms of the execution to recover the liquidated judgment sum of \$115, 978.00. This process is bound to be delayed on account of the current summons.
45. According to the Plaintiff, it will be Prejudiced if the setting aside of Default Judgment is allowed since the Default Judgment was entered regularly and that if the matter is further delayed, then obviously more expenses will be suffered.
46. However, in my view, the Plaintiff should not be prejudiced in any way, bearing in mind when the matter was commenced and for what length of time it has been pending for Court's determination. Upon any decision reached on the current setting aside of the default judgment order, the Plaintiff will definitely be entitled to any costs incurred unnecessarily.

E. IN CONCLUSION:


47. For the aforesaid rational, I accede to the Defendants' Summons seeking an order to set aside the Default Judgment entered against them on 18th May 2023. The Default Judgment has to be accordingly set aside and the Defendants should be granted the leave to defend the action.
48. The Defendants are also should be directed to file and serve their Statement of Defence and Counter-claim, if any, within 21 days and the Plaintiff should be granted 14 days thereafter to file and serve Reply to Defence and Defence to Counter-Claim.
49. The matter needs to be expedited and both Counsels, representing the parties to these proceedings, must ensure to follow a strict timetable set by the court and assist the Court to determine the matter as expeditiously as possible. The Defendants are entitled to summarily assessed costs in a sum of \$ 1,000.00 payable by the Plaintiff.

F. FINAL ORDERS:

- i. The Defendants' Summons, seeking to set Aside the Default Judgment entered against them on 18th May 2023, succeeds.
- ii. The Default Judgment entered on 18th May 2023 is hereby set aside.
- iii. The Defendants are allowed to file and serve their Statement of Defence, with Counter-Claim, if any, within the next 21 days.
- iv. The Plaintiff is at liberty to file and serve a Reply to the Defence and Defence to Counter-Claim in 14 days thereafter.
- v. The Defendants are ordered to pay a sum of \$1,000.00 (One Thousand Fijian Dollars) to the Plaintiff, within the next 14 days, as summarily assessed costs.
- vi. The parties are directed to abide by the above orders and to appear before the Master, when noticed, for PTC formalities.

On this 12th Day of February 2025 at the High court of Lautoka.




A.M. Mohamed Mackie.
Judge.
High Court (Civil Division)
Lautoka.

SOLICITORS:

For the Plaintiff- Messrs. Patel & Sharma Lawyers- Barristers and Solicitors.

For the Defendants- Messrs. A. K. Singh Law- Barristers & Solicitors.