

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 27 OF 1989

BETWEEN

JALIL KHAN

Appellant

and

ALI MOHAMMED f/n Raja

Respondent

Mr F. Lateef for the Appellant

Mr G. P. Shankar for the Respondent

Date of Hearing: 6th June, 1990.

Delivery of Judgment: 19th June, 1990.

J U D G M E N T

The Appellant, the defendant in this action appeals against the decision of Byrne J. dismissing his application to set aside the default judgment obtained by the Respondent against him.

The grounds of appeal are as follows :-

1. That the learned trial judge erred in fact and in law in not setting aside the judgment in default entered against the Appellant when there were triable issues before this Honourable Court and the Appellant had a proper and arguable defence to the claim by the Respondents as can be ascertained from the proposed Defence and affidavits which have been filed herein for the appellant and which Defence and Affidavits allege that the Appellant has paid all monies owed by him to the Respondent.

2. That the learned judge erred in law in holding that the default judgment should not be set aside simply because the Appellant had not filed an affidavit in reply to the Respondents affidavit.
3. That the learned judge erred in law in finding that there is no prima facie defence when in fact documentary evidence clearly established that there was a prima facie defence.

The three grounds can be considered together. The affidavits filed by the parties disclose a serious flaw in the Respondent's statement of claim which had the learned judge appreciated it, would have resulted in the default judgment being set aside.

The flaw is that the Solicitors for the Respondents in preparing the Statement of Claim did not appreciate that there were two separate contracts entered into by the parties to sell and purchase a D6 tractor and the claim was in respect of the first contract which was settled by the Respondent taking back the D6 in full settlement of the amount then owing by the Appellant and then selling the Defendant a cheaper tractor. Some time later the Defendant purchased the same D6 from the Defendant for a lower price.

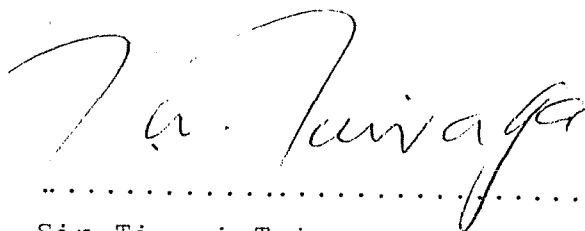
The claim should have been based on the amount alleged to be owing on the second sale which was entered into close on three years after the plaintiff took back the D6 and sold the Defendant the cheaper tractor.

The mistake is capable of being remedied by the Respondent amending his statement of claim. He cannot however be permitted to rely on a default judgment obtained in an action where he himself has disclosed facts which indicates a defence also raised by the appellant to the claim based on a contract which was fully performed by the parties varying the contract and by the Respondent taking

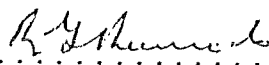
back the D6 in full settlement of the balance due on the contract.

The appeal is allowed.

The judgment is set aside with costs to the Appellant.



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Sir Timoci Tuivaga
President, Fiji Court of Appeal



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Sir Ronald Kermode
Justice of Appeal



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Sir Moti Tikaram
Justice of Appeal