IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0030/97S
(Original Lautoka High Court Action No. HBC0395 of 1995L)

BETWEEN: WEARSMART TEXTILES LIMITED *Appellant*

AND: GENERAL MACHINERY HIRE LIMITED *1st Respondent*
SHAREEN KUMAR SHARMA *2nd Respondent*
(f/n D.K. Sharma)

Coram: The Hon Sir Moti Tikaram, President
The Rt Hon Sir Maurice Casey
The Hon Justice J.D. Dillon

Hearing: 26 May 1998

Counsel: Mr C.B. Young for the Appellant
Mr G.P. Shankar for the 2nd Respondent

Date of Judgment: Friday 29 May 1998

JUDGMENT OF THE COURT

This is an appeal against the decision of Lyons J. dated 21 March 1997 whereby he set aside a default judgment entered against the 2nd Respondent Shareen Kumar Sharma (the Original 2nd Defendant) on 11 March 1996. In setting aside the judgment he made the following Orders:-

(i) *That the judgment entered herein against 2nd Defendant be and is hereby set aside upon condition that the 2nd Defendant do within 30 days pay to Plaintiff's solicitors costs fixed at $750.00 (Seven hundred and fifty dollars).*

(ii) *That the 2nd Defendant is restrained from further encumbering or selling Motor Car No. BM252, until final determination of this action, without leave of the Court.*

(iii) *That leave is granted to 2nd Defendant to file Statement of Defence.*

(iv) *That upon the payment of above amount $750.00 plus disbursement the car will be released."*

Grounds of Appeal

The Appellant has filed its appeal on the following 4 grounds:-

(1) ***That the Learned Judge erred in law in setting aside the default judgment and assessment of damages on the basis that the solicitor who acknowledged service had not been notified of the Plaintiff's intention to so enter judgment.***

(2) ***The Learned Judge erred in law and fact in considering that the solicitor who acknowledged service had not received notification of the Plaintiff's intention to enter judgment when there was no evidence to support the said allegation.***

(3) *Alternatively that the Learned Judge erred in law in deciding that the entry of judgment and assessment of damages, being both judicial and administrative acts, distinguish the present situation from that existing in Shiu Kumari v. Ram Narayan - HBC66/94L.*

(4) *The Learned Judge erred in law in failing to decide that the 2nd Defendant had only shown a possible indemnity action and not a defence to the Plaintiff's claim.*

The Appellant has now abandoned ground (3) of the appeal.

Parties in the Court below

The Appellant (Original Plaintiff) is a limited liability company operating a garment factory in Nadi. The 1st Respondent (Original 1st Defendant) is also a limited liability company carrying on business in Lautoka as a garment manufacturer. The 2nd Respondent (Original 2nd Defendant) is a registered bailiff and was at the material time acting as the servant or agent of the 1st Respondent.

Chronology of events

On 8 February 1996 the Appellant commenced proceedings against both Defendants claiming damages for an alleged defamation arising out of an advertisement published in the Fiji Times of 21 November 1995. There is no dispute that the advertisement complained of was inserted by the 2nd Respondent. The advertisement reads:-

> ***"Following clients would you please contact bailiff on phone number 668841, 668894, Lautoka regarding your overdue account:-***
>
> ***(i) Wearsmart Textiles Limited of Martintar, Nadi. 3 years old account."***

As noted by Lyons J. in his assessment decision dated 1 March 1996 the Appellant did business with the 1st Respondent. A dispute arose over monies owing to the 1st Respondent by the Appellant. A demand for monies was made by the 2nd Respondent on behalf of the 1st Respondent. Appellant refused to pay saying that these were in dispute. A threat to put in an advertisement in the newspaper was made by the 2nd Respondent.

In paragraph 11 of its Statement of Claim the Appellant claimed that its credit and reputation has been injured. And in paragraph 12 the Appellant claims that a request to publish an apology has not been met.

The chronology of events in this case is as follows:-

28/12/95	Writ of Summons and Statement of Claim together with Acknowledgment of Service served on 1st Respondent through registered mail.
29/1/96	Statement of Defence filed by Messrs. Krishna & Co. for 1st Respondent.
8/2/96	Amended Writ of Summons filed by the Appellant whereby the name "Rajesh Sharma" was substituted with the name of the 2nd Respondent "Shareen Kumar Sharma".
14/2/96	Amended Writ of Summons and Statement of Claim together with Acknowledgment of Service served on the 2nd Respondent.
15/2/96	Acknowledgment of Service & Intention to Defend filed by Messrs Fatiaki & Singh on behalf of the the 2nd Respondent.
11/3/96	Interlocutory Judgment entered against the 2nd Respondent in default of filing Defence within 14 days as prescribed.
7/5/96	Notice for Assessment of Damages filed against 2nd Respondent.
20/5/96	Notice for Assessment of Damages served on the 2nd Respondent.
7/6/96	Notice for Assessment of Damages was heard in the absence of 2nd Respondent or his Counsel.

1/11/96	Judgment delivered by Lyons J. whereby he awarded $10,000 damages against the 2nd Respondent - $7,000 as general damages and $3,000 as exemplary damages (see pages 32-39 of the Record).
4/3/97	Writ of Fieri Facias was issued against the 2nd Respondent.
10/3/97	Summons and Affidavit filed by G.P. Shankar & Co. on behalf of the 2nd Respondent for setting aside judgment and also for a stay order (see pages 3 to 8 of the Supplementary Record).
11/3/97	Application by the 2nd Respondent was first called before the Judge in chambers.
19/3/97	2nd Respondent's application heard and granted by Lyons J.; oral Orders made subject to conditions - full reasons to be delivered later.
21/3/97	Lyons J.'s Order sealed . (See page 40 of the Record.)
21/3/97	Statement of Defence filed by 2nd Respondent. (See pages 42 and 43 of the Record.)
23/5/97	Lyons J.'s decision giving reasons for setting aside judgment on conditions, delivered. (See pages 69 to 72 of the Record).
24/6/97	Notice of Motion and Grounds of Appeal filed by the Appellant.

We note that the action against the 1st Respondent is pending in the High Court.

Entry of Default Judgment

In this case there is no dispute that the interlocutory default judgment

was regularly entered. Order 13 r.2 of the High Court Rules 1988 reads:-

> ***"Claim for unliquidated damages (O.13, r.2)***
>
> ***2. Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any."***

(See also Order 19 r.3 of the Rules)

Assessment of damages

There is also no dispute that the assessment of damages in the absence of the 2nd Respondent was also regular in that the 2nd Respondent was properly served but failed to appear. When a defendant is given notice of hearing of assessment he may, even though he has not previously appeared, attend in person or by Counsel. He is entitled to cross-examine the witness called on behalf of the plaintiff, call evidence himself on issue of *quantum* and address the Court. When the damages (or value of chattel) have been assessed then the plaintiff can enter *final* judgment for the amount assessed. (See Order 37, rr. 1-6.)

Discretion to set aside or vary Judgment

A judgment in default of notice of intention to defend, or defence may be set aside or varied unconditionally or upon terms.

Order 13 r.10 reads as follows:-

"Setting aside judgment (O.13, r.10)

10. Without prejudice to rule 8(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

And Order 19 r.9 provides :-

"Setting aside judgment (O.19, r.9)

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

In Evans v Bartlam [1937] A.C. at p.480 the House of Lords (per Lord Atkin) stated -

"The principle obviously is that unless and until the Court has pronounced judgment upon merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained by a failure to follow any of the rules of procedure."

A judgment in default is not a judgment 'upon merits'. See Oppenheim v Mohammed [1922] 1 AC 482.

The issue

Both Counsel agree that the real issue before this Court is whether the trial judge acted on correct principles in setting aside the default judgment on terms.

The Appellant's contention

Counsel for the Appellant Mr Young dealt with grounds 1 and 2 together as they are inter-related.

Mr Young is correct in submitting that the learned Judge appears to have based his decision to set aside the judgment almost entirely on the following observations of his -

(i) ***"a convention of practice that where solicitors have filed a notice of intention to defend/Acknowledgment of Service, judgment should only be entered up to those solicitors have been notified of the intention to do so."*** (See page 70 of the Record.)

(ii) ***"Taking into account of all of the circumstances of this matter and in particular those sentiments expressed in SHIU KUMAR'S case where, in following what the Chief Justice had previously said, I consider that it is an obligation of Practitioners to follow conventions of practice, particularly conventions of longstanding, I consider it proper to set aside judgment in this matter ..."*** (See p.71 of the Record.)

[In Bula Timber v Geelong Holding Limited, Civil Action No. 173 of 1977 (unreported) Tuivaga J.(the present Chief Justice who was then a High Court Judge) on setting aside a default judgment had stated:-

> " ***I think it is fair to record that a practice appears to have developed at the bar in this country whereby counsel for one party would as a matter of good conscience give notice to the other side of any intended step to enter judgment by default and calling upon the other side to move in the matter if it desires to defend the action.***
>
> ***This practice seems particularly desirable where it appears that the other side has not for one reason or another had sufficient time to organize itself into a position where it could take appropriate steps in the matter or where from the nature of the case it seems likely that the other side would***

want to contest the action on the merits."]

In his written submissions Mr Young makes the following comments on Lyons J.'s observations:-

> *"4.2.1* ***Firstly, there is no evidence of such convention or for that matter that such convention was not followed. Certainly the 2nd Respondent's affidavit does not refer to it in any way.***
>
> *4.2.2* ***Secondly, if one was to accept that such a convention did indeed exist, it is at best an arrangement between solicitors and not something that should be automatically elevated to a rule of the Supreme Court. The setting aside of judgment on this supposed "convention" is therefore improper. To do so would be to render Order 13 Rules 1 and 2 of the High Court Rules 1988 obsolete and if not, treat this "convention" as superior to the Rules of the High Court.***
>
> *4.2.3* ***Furthermore, this "convention" if it did exist was not given any recognition or consideration by the Court of Appeal in:-***
>
> ***Mohammed Hasim v. Naseeran Nabi in Civil Appeal No. 38 of 1991; and***
>
> ***Jitendra Chand Lal & Anor v. Car Rentals Pacific Ltd. in Civil Appeal No. 70 of 1991.***
>
> ***Both these cases involved solicitors acting for the Defendants at first instant who filed Acknowledgment of Services but judgment one way or another was entered in default. It is implied and very clearly so it is submitted, that in these judgments, that an entry of judgment by default without so much of a warning to do so, was irrelevant for the purposes of considering an application to set-aside that judgment.***
>
> *4.2.4* ***The 2nd Respondent in his Affidavit failed to support his application to set-aside the judgment does not complain about this non-observance by the Appellant of this convention."***

As regards the 4th ground of appeal Mr Young submits -

(1) The 2nd Respondent does not deny being responsible for the publication complained of;

(2) There can be no defence to an action for libel bearing in mind the threat to publish and the natural and inferential meaning of the words used in the advertisement namely the Plaintiff was owing monies on an 'overdue account' and was unable to pay them.

(3) A possible indemnity does not constitute a defence.

The 2nd Respondent's submissions

Mr G.P. Shankar's oral and written submissions in support of Justice Lyons' decision can be briefly summarised as follows -

(i) The spirit of justice is more important than the letter.

(ii) The Rules must be the servant not the master of the Court.

(iii) If the Act or Rules did not fetter the Judge's discretion this Court should not interfere with the exercise of his discretion.

(iv) The party likely to suffer the greater injustice should be shown indulgence. His client was the party likely to suffer the greater injustice.

(v) The practice and procedure as set out by the Chief Justice in Bula Timber v Geelong Holding case was correct; it has become a convention and the learned Judge was justified in following it.

(vi) There is no inflexible rule calling for an explanation why default judgment was allowed to be entered.

(vii) It would be wrong to hold that the 2nd Respondent should be left to seek remedy against his solicitors.

(viii) Discretion should be exercised to avoid an injustice having regard to the particular circumstances of the case in hand. The learned Judge correctly exercised his discretion and his discretion has not miscarried.

(ix) Whilst agreeing that no purpose will be served in setting aside a judgment if there can be no possible defence, in this particular case there is a serious question for determination, i.e. whether the facts can really constitute actionable libel. The 2nd Respondent has a valid defence in Court namely the words complained of were not reasonably capable of defamatory meaning (see Sim v Stretch (1936) 2 All ER 1237).

Principles on which Courts act

The general principles upon which a Court should act on an application to set aside a judgment that has been regularly entered, are set out in the White Book, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143. They are as follows:-

> *" Regular judgment -If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., ibid. p.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183, p.363).* 13/9/5
>
> *For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., and note 13/9/14, "Discretionary powers of the court," below.*
>
> *On the application to set aside a default judgment the major consideration is 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 (Vann v. Awford (1986) 83 L.S.Gaz. 1725; The Times, April 23, 1986, C.A.) The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his*

defence and the way in which the court should exercise its discretion (see para. 13/9/14, below)."

Material in support of 2nd Respondent's application

The chronology of events will show that the 2nd Respondent did nothing to set aside the default judgment for over 12 months and then only after fieri facias had been issued. Lyons J. set aside the default judgment on 19/3/97 and gave his written reasons on 23 May 1997.

We feel it would be useful to set out the relevant parts of the 2nd Respondent's affidavit dated 10 March 1997 in support of his application to set aside the default judgment against him. They were as follows:-

"2. *THAT I was served with Writ of Summons.*

3. *THAT I instructed Messrs. Singh and Fatiaki for me in this matter.*

4. *THAT I am advised by my present Solicitors and I verily believe that Messrs. Singh and Fatiaki filed acknowledgement of service indicating that the Defendant intends to defend this action but did not file defence.*

5. *THAT I did not realise that in a defamatory action the Plaintiff could enter interlocutory judgment and proceed to enter judgment because I was under the impression that a formal hearing would take place to determine whether the alleged words were defamatory.*

6. *THAT I now realise that my understanding was probably wrong.*

7. *THAT the Plaintiff I believe still has its claim pending against the first defendant.*

8. *THAT I most humbly pray to this Honourable Court to set aside the interlocutory judgment and assessment done therein and grant me leave to file defence.*

9. THAT annexed hereto and marked "A" is copy of my proposed defence, and in so far as facts contained therein are true, and in so far as matter of law and/or other matters not within my personal knowledge, I verily believe to be correct.

10. THAT I acted on instruction of the first Defendant for and on its behalf and I claim that I am in any event indemnified by the first Defendant. I pray that I be granted leave to issue third Party notice against the first Defendant."

In his proposed Defence referred to in his affidavit the 2nd Respondent stated, inter alia -

"2. AS to paragraph 4 the second Defendant admits that acting on instructions of first defendant he made demand for payment of debts which first defendant claimed the Plaintiff owed to him, and the second defendant honestly and reasonably believed that debt in fact was owing.

3. AS to paragraph 5 save for making formal demand in a normal manner, the second Defendant categorically denies each and every other allegation contained in paragraph 5 of Statement of Claim.

5.1 AS to paragraph 7 the second defendant repeats the foregoing and says:-

(a) He had no instructions to withdraw the notice;

(b) he acted on instructions of (express and or implied for recovery of debt) first defendant;

(c) the Plaintiff's Solicitors did not speak to second Defendant.

5.2. THE second defendant denies that the information or statement alleged in paragraph 7 was false malicious or defamatory in my (sic) manner.

5.3 THE text of the publication quoted in paragraph 7 does not in its ordinary meaning constitutes defamation nor is it capable of being conveyed defamatory meaning. In any event the second defendant had no knowledge of alleged falsity and he acted innocently.

9. THE second Defendant denies the contents of paragraph 11 and 12 of Statement of Claim.

10. ALTERNATIVELY the second Defendant claims that he acted for and on behalf of the first defendant and on his instructions and would claim indemnity against first Defendant.

11. THAT the award of damages are too high and assessed on wrong principles."

In his affidavit the 2nd Respondent deposed to the truth of the facts in this statement of defence.

Re "The Convention"

We agree with Mr Young that if the alleged "convention" did exist then it was a matter of professional courtesy between practitioners. It cannot be elevated to a rule of law to prevail over or compete with the relevant prescribed Rules of the Court. If Mr Shankar's argument is correct that the alleged practice should be followed because it has become a 'convention' then he could have argued that the entry of default judgment under Order 13 r.2 was irregular. On the contrary he agrees it was not irregular. In any case Mr Shankar was unable to cite any case where this Court recognised such a practice as a rule of law.

In Allen v Sir Alfred McAlpine & Sons Ltd [1968] All ER 543 the Court of Appeal held that there is no rule that a plaintiff's solicitor should be given prior warning of the defendant's intention to apply to dismiss an action for want of prosecution, and if there is any tacit understanding to that effect the sooner it is abandoned the better (see Lord Diplock's strong disapproval of any such practice at p.555 letter I post). We adopt the same approach in this case with regard to entering of default judgment. In fact we venture to suggest with respect that the learned Chief Justice never intended that any such practice

between solicitors should have the force of a rule of law. We have no hesitation in holding that the learned trial Judge erred in law in basing his decision to set aside the default judgment on the alleged failure of the Appellant to follow the so-called convention.

But the matter does not end here. We feel we are entitled to look at the material before the trial Judge to see if he could have properly exercised his discretion in favour of the 2nd Respondent to avoid any possible injustice.

Exercise of discretion and defence on the merits

The learned trial Judge had totally failed to consider whether the 2nd Respondent had any defence on the merits. And yet as we have already noted under the heading Principles on which Courts act, it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing defence on the merits.

Dealing with the discretionary powers of the Courts under English Order 13 r.9 sub-rule 14 the Supreme Court Practice 1997 (the White Book) (Vol. 1 p.145) cites the Court of Appeal's judgment in Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221 as authority for following prepositions:

> *"(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."*

Notwithstanding the Court of Appeal's later decision in Allen v Taylor [1992] P.I.Q.R. 255 which purports to dilute the principles emerging from Saudi Eagle, we subscribe to the White Book's preferred view that 'unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no "real prospect of success" is shown and relief should be refused'.

Before we proceed to examine whether the 2nd Respondent had demonstrated any defence on the merits we can shortly dispose of the 4th ground of appeal by upholding it. Any possible claim for indemnity that the 2nd Respondent might have against the 1st Respondent, did not constitute a defence in law against the Appellant.

The basic facts established by the 2nd Respondent's affidavit are that he as a bailiff made a demand for monies on the Appellant for and on behalf of the 1st Respondent and that he inserted the advertisement complained of on instructions from the 1st Respondent.

In his proposed defence the 2nd Respondent claims that he "honestly and reasonably believed that the debt in fact was owing", but this of itself is not a defence.

We have already reproduced the advertisement on p.3 of this Judgment.

The advertisement states that the account is "3 years old". In our view the advertisement is clearly defamatory of the Appellant. It imputes to the Appellant an inability or refusal to pay its debt owing for a long period. We are also of the view that the case of Sim v Stretch cited by Mr Shankar is

inapplicable to the present situation because the facts are distinguishable.

The position of an agent or servant

The learned author of Gatley on Libel and Slander, 8th Ed. states in paragraph 949 on page 411 -

> ***'Every person who publishes a libel or slander is personally liable. It is no defence that he was acting merely as the agent or servant of another, for "it is a fundamental principle of English law that no tortfeasor can excuse himself from the consequences of his acts by setting up that he was acting only as the agent of another".'*** (See dictum of Lord Moulton in Vacher v London Soc. Compositors [1913] A.C. at pages 130-131.)

We respectfully agree that the 2nd Respondent is personally liable even though he was acting as an agent for the 1st Respondent. The 2nd Respondent therefore has no defence on the basis that he was an agent.

We hold that the learned Judge acted on wrong principles in setting aside the default judgment when the 2nd Respondent failed to show any defence on the merits.

Our view that the 2nd Respondent had no defence on the merits is now further strengthened by his attempt to shift ground in a material and significant way. In his formal Statement of Defence filed on 20 March 1997 (which is not supported by an affidavit) he now says that it was his father who acted on the instructions of the 1st Defendant, i.e. the 1st Respondent.

Para 5.1 of his formal Statement of Defence reads:-

"5.1 AS to paragraph 7 the second Defendant repeats the foregoing and says:-

(a) He had no instructions to withdraw the notice;

(b) His father acted on instructions of (express and or implied for recovery of debt) first defendant;

(c) The Plaintiff's Solicitors did not speak to second Defendant."

Re Assessment of damages

We note that the 2nd Respondent has not given any explanation at all why he did not appear to contest the assessment of damages, having previously failed to file a defence on being served with the writ of summons.

Be that as it may, we are of the view that whilst the default judgment must be restored the ends of justice will be served if we were to allow the 2nd Respondent an opportunity to contest the assessment of damages. We propose to do so largely because Mr Young has generously indicated that he would have no objection to such a course being taken provided his client was not denied its costs in this Court.

Decision

For the reasons given we make the following Orders:-

(i) Appeal allowed, Lyons J.'s Order setting aside judgment by default and giving leave to defend set aside; interlocutory default judgment restored.

(ii) $750 costs awarded to Appellant in the Court below to stand.

(iii) Assessment of damages to be heard de novo on an inter-partes basis.

(iv) Case remitted to the Lautoka High Court for assessment of damages on a date to be fixed by the Registrar after consulting the trial Judge.

(v) 2nd Respondent to pay to Appellant the costs and disbursements of this appeal. We fix the costs at $500 and the disbursements are to be fixed by the Registrar if the parties cannot agree.

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Sir Moti Tikaram
President

.....

Sir Maurice Casey
Justice of Appeal

.....

Justice J.D. Dillon
Justice of Appeal

Solicitors:
Messrs Young & Associates for the Appellant
Messrs G.P. Shankar & Co. for the 2nd Respondent

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