

IN THE HIGH COURT OF FIJI
AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 413D OF 2006S

<u>BETWEEN</u>	:	<u>PHULWATI</u> a.k.a <u>FEROZA BIBI</u> a.k.a. <u>PHULMATI</u> a.k.a. <u>FIROZA BIBI</u>	<u>PLAINTIFF</u>
<u>A N D</u>	:	<u>BYEONG BAK KWON</u> and <u>FIJI TAE KIM</u>	<u>1ST DEFENDANT</u>
	:	<u>NAZIR HUSSAIN</u>	<u>2ND DEFENDANT</u>
	:	<u>ACTING REGISTRAR OF TITLES</u>	<u>3RD DEFENDANT</u>
	:	<u>ATTORNEY-GENERAL OF FIJI</u>	<u>4TH DEFENDANT</u>

Counsel for the Plaintiff	:	S. Chandra	:	Maharaj Chandra & Assoc.
Counsel for the 1 st Defendant	:	C. Lateef	:	Lateef & Lateef
Counsel for the 2 nd Defendant	:	N/A		
Counsel for the 3 rd & 4 th Defdt.:		Ms. N. Karan	:	Attorney-General's Chambers
Date of Decision	:	13 April, 2007		
Time of Decision	:	10.30 a.m.		

EX-TEMPORE DECISION

The reasons given by Counsel for the 1st Defendant to set aside the default judgment are understandable only if there had been a clear unambiguous agreement between Counsel, with the consent of the Court that the filing of the defence is to be deferred until all interlocutory matters are disposed of. In this instance, according to the

Counsel for the 1st Defendant, there was such an understanding. Soon after having successfully moved the removal of the solicitors names as 4th Defendant as a party to the proceedings, the Plaintiff then sought the Court's approval for service out of jurisdiction in respect of the 2nd Defendant. This was obtained on 25 September 2006 and on 16 October, Counsel advised the Court that they were still attempting to advertise in a particular overseas daily. The matter was adjourned to 28 November where the Court was informed by the Plaintiff that the advertisement had already been placed and the affidavit of service to be filed shortly. The matter was then adjourned to 26 January, 2007 for mention. On 26 January, Counsel for the 1st Defendant informed the Court, that after discussion with the Counsel for the 3rd and 4th Defendant they had agreed that Court may receive some assistance, if it were to allow the affidavit of the 3rd Defendant, the Registrar of Titles to be filed first. This was filed on 8 February. In the meantime the Plaintiff after having searched for the defence and not finding any, entered default judgment on 14 February.

Setting aside any default judgment, is the exercise the Court's discretion. Whether the exercise is made pursuant to Order 13 rule 10 or Order 19 rule 9 the guiding principle is the same. Lord Atkins articulated this principle in Evans v. Bartlam [1937] AC 480 as follows:

"The principle obviously 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."

It could very well be in this case that Counsel for the 1st Defendant's failure to file its defence was due to what he understood to be an agreement between the parties that the statement of defence will be filed later.

However Counsel for the Plaintiff refutes this and the Court is not in a position to verify from its record that there was such an understanding. What however is clear is the fact that there were quite a few applications by all the parties for either extensions of time or for changes in the order of filing of affidavits that may have added some confusion in the conduct of the case.

The Plaintiff's latest affidavit is intended to show that there is no merit in the 1st Defendant's defence. However, the Court cannot decide this action on affidavit evidence alone, or allegations made by the parties. In any case, the draft statement of defence attached to the 1st Defendant's affidavit is directly opposed to the Plaintiff's assertions.

Under these circumstances, the Court is of the view that the 1st Defendant should be allowed to proceed to defend the action.

Order is made for default judgment entered against the 1st Defendant on 1st February, 2007 be is hereby set aside. Defence to be filed within 14 days.

The hearing of the Plaintiff's inter parte motion is adjourned to 21 May, 2007 at 10.00 a.m. Submissions by Counsel to be filed by 18th May.

Costs of \$300.00 against the 1st Defendant.



J. Jitoko
JUDGE

At Suva

13 April 2007