

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 168 of 2005

BETWEEN : **GHIM LI APPAREL (FIJI) LIMITED** a limited liability Company having its registered office at 12 Walu Street, Marine Drive, Lautoka.

Plaintiff

AND : **DAUMAKA GARMENTS LIMITED** a limited liability Company having its registered office at Lot 2, Vishnu Deo Road, Nakasi, Nasinu.

Defendant

COUNSEL : I. Fa for Plaintiff
D. Sharma for Defendant

Date of Ruling : 19 June 2013

RULING

(Application to set Aside Judgement by Default)

1.0 Introduction

1.1 On 25 July 2005, the Plaintiff filed Summons for an Order that Judgement by Default entered on 29 June 2005 on Defendant's counterclaim against the Plaintiff be set aside on the grounds stated in the supporting Affidavit of Nick Zhueng sworn on 23 July 2005.

1.2 Parties have filed following Affidavits in respect to the setting aside application:-

Plaintiff/ Applicant

- (i) Affidavit of Nick Zhueng sworn on 23 July 2005 and filed on 25 July 2005.
- (ii) Affidavit in Reply of Nick Zhueng sworn on 12 October 2005 and filed on 14 October 2005.

Defendant/ Respondent

- (i) Affidavit of Tang Yan Shun sworn and filed on 30 August 2005.
- (ii) Further Affidavit in Reply of Tang Yan Shun sworn on and filed on 28 October 2005.

2.0 Chronology of Events

- (i) On 14 April 2005 Plaintiff filed:-
 - (a) Writ of Summons with Statement of Claim;
 - (b) Ex-parte Notice of Motion seeking restraining order against the Defendant;
 - (c) Affidavit of Jason Lai sworn on 13 April 2005.
- (ii) On the same day Order was granted by His Lordship Justice Jitoko (as then he was) restraining the Defendant from preventing the Plaintiff from removing certain items from its factory at 9 ½ Miles, Nasinu.
- (iv) On 18 April 2005 Messrs R. Patel & Co., filed Acknowledgement of Service on behalf of the Defendant.
- (v) On 20 April 2005 Affidavit of Tang Yan Shun sworn on the same day was filed on behalf of the Defendant in response to Affidavit of Jason Lai.
- (vi) On 21 April 2005 Defendant filed Inter – Parte Notice of Motion for an order to dissolve the restraining Orders granted on 14 April 2005 together with Affidavit in support of Tang Yan Shun

sworn on 21 April 2005 which Motion was returnable on 5 May 2005.

- (vii) On 29 April 2005 Defendant filed and served Statement of Defence and Counterclaim.
- (viii) On 5 May 2005 the Inter – Parte Notice of Motion was adjourned to 7 July 2005 for Argument and was subsequently adjourned for Ruling on Notice.
- (ix) On 29 June 2005 Defendant entered Judgment in Default of Defence to Counterclaim in following terms:-

“1. That Interlocutory Judgement be entered against the Plaintiff on claims made by the Defendant against the Plaintiff in paragraphs 19, 20, 32, and 41 of the Counterclaim and further that the Plaintiff do pay the Defendant damages to be assessed.

2. That Judgement be entered against the Plaintiff in the sum of \$77,787.03 (SEVENTY SEVEN THOUSAND SEVEN HUNDRED EIGHTY SEVEN DOLLARS AND THREE CENTS).

3. That the Plaintiff pay interest to the Defendant on the damages to be assessed and on the sum of \$77,787.03 at the interest rate to be determined by the Court.

4. That the Plaintiff pays cost to the Defendant to be taxed, if not agreed.”

- (x) On 31 October 2005 the setting aside application was called before his Lordship Justice Jitoko (as then he was) and by consent parties were ordered to file written submission and ruling was to be delivered on notice thereafter.
- (xi) Plaintiff filed its submission on 21 November 2005 whereas Defendant filed its submission on 19 July 2006.

- (xii) His Lordship Justice Jitoko did not deliver his ruling prior to him leaving the judiciary.
- (xiii) Thereafter this matter was referred to Justice Hettiarachchi (as he then was) and on 14 September 2012 parties agreed for his Lordship to deliver the ruling based on Submissions and Affidavits filed herein.
- (xiv) However his Lordship Justice Hettiarachchi also did not deliver his ruling prior to leaving the judiciary.
- (xv) I caused this matter to be called on 4 June 2013 when Counsel for both parties agreed for me to deliver the ruling on Application to set Aside Default Judgement on basis of Submissions and Affidavits filed herein.
- (xvi) At this point I note that Counsel for the Defendant rendered his sincere apologies for delay in filing Defendant's submissions.
- (xvii) Whilst accepting the Defendant Counsel's apology, I on the same breadth offer my apology on behalf of this Court for delay in delivering this Ruling.

3.0 Preliminary Issue

- 3.1 Before I deal with the Application to set aside default judgement I wish to highlight certain defects in the Affidavits filed on behalf of the Plaintiff.
- 3.2 Affidavit of Nick Zhueng sworn on 23 July 2005 referred to in paragraph 1.2 1(i) **hereof does not bear name of the Commissioner of Oaths or his stamp**. Whilst this cannot be attributed to any current registry staff and does not reflect on the Current Court Officers, registry should be more vigilant when issuing documents to ensure that documents filed are properly dated, pages are numbered, Commissioner of Oaths stamp is affixed although the responsibility lies with the Solicitors for the parties.

3.3 Current Chief Justice, His Lordship Justice Gates and other Judges of this Court have highlighted time and again the failure by parties in particular their Solicitors to comply with order 41 Rule 9(2) of the High Court Rules 1988.

Order 41 Rule 9(2) provides as follows:

“Every Affidavit must be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing and an Affidavit which is not so indorsed may not be filed or used without the leave of the Court.”

3.4 In the matter of ***Kim Industries Ltd.*** (Unreported) Lautoka High Court Winding – Up Action No. HBF0036 of 1999L, his Lordship Justice Gates (as then he was), the Current Chief Justice stated as follows:

“If any Affidavit bears an irregularity in its form such as the Omission of the endorsement note, leave must be obtained from the Court for it to be filed or used...” (page 3)

3.5 Similar comments were made by his Lordship in ***State v H.E. The President & Ors.*** (unreported) Lautoka High Court Judicial Review No. HBJ007 / 2000L 12 October 2000. ***Chandrika Prasad v Republic of Fiji*** (unreported) Lautoka High Court Action No. HBC0217 / 2000L [Ruling on Stay Application – 20 December 2000, Ruling on Joinder Application – 17 January 2001].

3.6 In ***Jokapeci Koroï & Ors. v Commissioner of Inland Revenue & Anor.*** (unreported) Lautoka High Court Action No. HBC179 / 2001L (24 August 2001) his Lordship Justice Gates (as then he was) and Current Chief Justice removed two (2) Affidavits filed on behalf of the Defendants from the Court file for failure to comply with the order 41 Rule 9 (2) and ordered the Defendants file the said Affidavit with endorsement in compliance with Order 41 Rule 9(2) within 14 days. His Lordship at page 4 of the Judgement stated as follows:

“These mistakes are of little consequence to the actual litigation but since the setting of the format of an Affidavit, vehicle for the presentation of sufficient evidence to the Court, is a relatively simple exercise, these errors should no longer persist.”

- 3.7 I commend the Solicitors for the Defendant for complying with Order 41 Rule 9(2) of High Court Rules even though except for Affidavit of Tang Yan Shun sworn on 28 October 2005 no other indorsement to the Affidavits bear the date the Affidavits were sworn on.
- 3.8 None of the Affidavits filed on behalf of the Plaintiff complies with Order 41 Rule 9(2) of the High Court Rules in any respect.
- 3.9 Also no leave has been sought by Counsel for the Plaintiff to use the Affidavits in this proceeding.
- 3.10 In view of the lapse of time since filing of Affidavits on behalf of Plaintiff and delay in delivering of this Ruling, leave is granted for Plaintiff to rely on the Affidavits filed. **However the litigants and their counsels should take note of the fact that failure to comply with Order 41 Rule 9(2) and failure to obtain Court’s leave to utilise these Affidavits could result in the Affidavits being removed from the court file which of course will be fatal to their client’s case.**

4.0 Application to Set – Aside Judgement in Default of Defence to Counterclaim

- 4.1 Order 18 Rule 3(4) provides as follows:

“A reply to any defence must be served by the Plaintiff before the expiration of 14 days after service on him of the defence, and a defence to counterclaim must be served by the plaintiff before the expiration of 14 days after service on him of the counterclaim to which it relates.”

4.2 Statement of Defence and Counterclaim was served on the Defendant on 29 April 2005 as appears from the Affidavit of Service of Lemeki Sevutia sworn on 27 June 2005.

4.3 As such the time for filing of Reply to Defence and Defence to Counterclaim expired on 13 May 2005.

4.4 Defendant entered Judgement in Default of Defence to counterclaim pursuant to Order 19 Rules 2, 3 and 8 of High Court Rules:

4.5 Order 19 Rules 9 of the High Court Rules.

“The Court may, on such terms as it thinks just, set aside or vary any judgement in pursuance of this order.”

4.6 It is not disputed by Defendant in its submission that this Court has an unsettled discretion to set aside the default judgment.

4.7 At paragraph 19 of Defendant’s Submission it states as follows:

“Under Order 13 Rule 10 of the High Court Rules a Court has discretionary power to set aside default judgment or vary the order. The same power is given under Order 19 Rule 9 as well.”

4.8 Principles and factors applicable to exercise of discretion under Order 13 Rule 10 of High Court rules is also applicable to exercise of discretion under Order 19 Rule 9; **Supreme Court Practice 1999 Volume 1 paragraph 19/9/1 page 368.**

4.9 Plaintiff does not challenge the Judgement by Default on grounds of any irregularity as it has not stated any irregularity as required by Order 2 Rule 2(2).

4.10 Therefore, the Judgement by Default entered in this action will for the purpose of this Ruling will be treated as regularly obtained.

4.11 At paragraph 403 of Halsbury’s Law of England Vol 37 4th edn it is stated as follows:

“In the case of a regular Judgement, 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 of a triable issue”.

4.12 Also at paragraph 13/9/7 of the Supreme Court Practice 1999 Volume 1 page 157 it is stated 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 the facts showing a defence on the merits (Farden v. Ritcher (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 Huddlestone, B., ibid. P.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. 126 n.;and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183 at 363).

For the purpose of setting aside a default judgement, 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, CA, and note 13/9/18, “Discretionary powers of the Court”, below.

On the application to set aside a default judgement the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reason 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; (1986) The Times, April 23, CA). The facts that he has told lie 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. 13/9/18, below).

- 4.13 In **Ratinam v Cumaraswamy & Anor** [1964] 3 ALL ER 933 in dealing with an Application for extension of time to file record of appeal out of the prescribed time, Lord Guest at page 935 paragraph A stated as follows:

“The rules of Court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure require 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.”

- 4.14 The principles stated in Halsbury’s Law of England, 4th Edition paragraph 403, Supreme Court Practice 1999 Volume 1 (paragraph 13/9/7) have been adopted and applied by Courts in Fiji in many cases dealing with setting of Judgement by Default and exercise of Courts discretion pursuant to Order 13 Rule 10 and Order 19 Rule 9.

See: Wearsmart Textiles Ltd v General Machinery Hire Ltd [1998] ABU 003u. 975 (29 May 1998), Pravin Gold Industries Ltd v. The New India Assurance [2003] FJHC 298; HBC 250d. 2002s (4 February 2003); Eni Khan v. Ameeran Bibi Ors (HBC 3/98s) 27 March 2003); and Nand v. Chand [2008] FJHC 310; HBC 222.2007 L (7 November 2008).

- 4.15 From the above it can be said the factors to be taken into account in dealing with such applications are:-

- (i) Whether the Applicant has reasonably explained the delay; and
- (ii) Whether Appellant has shown by way of Affidavit evidence that it has defence on merit which has some prospect of success **(major consideration)**; and
- (iii) Whether Defendant will be prejudiced and suffer any irreparable harm.

5.0 Whether Plaintiff has reasonably explained the delay in filing Defence to Counterclaim.

5.1 At paragraph 3 of Affidavit of Nick Zheung sworn on 23 July 2005 filed in support of the application he states as follows:

“That this Default Judgement is based on paragraphs 20 – 25 of the Statement of Defence and Counterclaim filed after the closure of our business due to Fiji no longer having a quota free access to the United States garment market on the 29th of April 2005. I say that the Plaintiff has been unable to response promptly to the Statement of Defence because the Plaintiff Managers who were in Fiji had left Fiji and have assumed their responsibilities”.

5.2 In the Outline of Plaintiff’s (Applicant) Arguments dated 15 November 2005 it states reason for delay as:

“The reason the Plaintiff did not file its Defence to Counterclaim on time has been because the Plaintiff’s Managers who supposed to have provided counsel with instructions to file the Defence had left for Singapore and that further, the court was at the relevant time seized of an application by the Defendant that was awaiting ruling. The Plaintiff was awaiting the outcome

of the Court's ruling before it would file a Defence. Further the Plaintiff's whole action is tied into the Counterclaim and the Plaintiff was of view that it was only appropriate that they be dealt with together".

5.3 The Plaintiff obtained restraining orders and filed Affidavit in support of the Ex-Parte Application. Obviously the Plaintiff's Solicitors should have had in their possession the necessary facts and documents to meet the Defendant's Counterclaim even in the absence of the Manager concerned. The Plaintiff knew about this proceeding and should have made sure that there is someone always available to give instructions to its Solicitors.

5.4 Also the fact that Inter-Parte Motion to dissolve the injunction has not been determined is not of itself a good reason for not complying with the time frame for filing Defence to Counterclaim.

5.5 It seem it is a general practice amongst some practitioners to not to take steps in respect to the substantive action where an interlocutory motion such as this is pending.

5.6 This practice must stop to avoid unnecessary delay in prosecuting the substantive matter except of course where the interlocutory motion is to determine certain issues or facts in the substantive matter which may either shorten the trial time of the substantive matter or entirely determine the substantive matter.

5.7 Whilst I do not consider the reasons given by the Plaintiff for its failure to file Defence to Counterclaim totally satisfactory. I am of the view it is sufficient for the purpose of the application before this Court.

6.0 Whether Plaintiff has defence on merits which has some prospects of success.

6.1 Defendant's Counterclaim has four causes of action:-

- (i) **"First Cause of Action:** Damage for Fraud and Misrepresentation";
- (ii) **"Second Cause of Action:** Claim for monies owed to Defendant";
- (iii) **"Third Cause of Action:** Even though no particular cause of action is stated in the heading it appears that it related to set-off of \$28,944.30 by the Plaintiff against monies claimed by the Defendant";
- (iv) **"Fourth Cause of Action:** Damage for trespass and unlawful seizure".

First Cause of Action

6.1 Defendant's first cause of action is based on alleged fraudulent misrepresentation which is denied by the Plaintiff in the proposed Statement of Defence to Counterclaim.

6.2 It is for the Defendant to prove the allegation of fraudulent misrepresentation by calling evidence at trial.

Sharma v. Akheil Properties Ltd. (2010) FJCA 8, ABU0030. 2008 (18 February 2010)

6.3 Furthermore substantive part of Defendant Claim for damages (\$2,700,000.00) is under this head of damage which of course needs to be assessed by Court after hearing evidence and determining the issue on liability.

Second Cause of Action

6.4 Defendant claims \$77,787.03 as amount due and owing by the Plaintiff pursuant to sub-contract for supply of garments to Plaintiff.

- 6.5 Affidavit of Nick Zheung filed in support of application to set-aside Default Judgement mainly disputes this claim and provide Plaintiff's version of details as to how the amount owing by the parties to each other are reconciled.
- 6.6 It is apparent from the Counterclaim and the Affidavit that both parties claim that they owe money to each other and whatever the amount owing by them to each other is subject to set-off as pleaded in the Third Cause of Action is a matter that needs to be determined after hearing documentary and one evidence during trial.

Fourth Cause of Action

- 6.6 Defendant's claims damage for trespass and unlawful seizure.
- 6.7 It is obvious that the Plaintiff by its agents or servant entered the premises rented by Defendant pursuant to Order of this Court made of 14 April 2005.
- 6.8 Defendant alleges that Plaintiff by its agents or servant removed items which did not form part of the Order of 14 April 2005 and that Plaintiff by its agents or servants stole \$15,000.00 cash belonging to the Defendant which has been denied by the Plaintiff in the proposed Defence of Counterclaim.
- 6.9 The allegation in the Fourth cause of Action once again needs to be tried by calling witness.
- 6.10 It is apparent from the pleadings and Affidavits filed by the parties that both parties entered into a sub-contract whereby Defendant was to make garments and supply to Plaintiff for Plaintiff to supply to Plaintiff's customers.

The Defendant used the Plaintiffs machines and equipment to carry out the work subject to the sub-contract.

The Defendant entered into a Sale and Purchase Agreement whereby it agreed to purchase the assets and machines of the Plaintiff situated

at Defendant's premises and the purchase price for the assets and machines was not paid at the time of filing of the Counterclaim.

This dispute between the parties arose when Defendant became aware that the Plaintiff is closing its operations in Fiji and Plaintiff demanded return of its machines and assets situated at Defendant's premises.

Even though I have highlighted certain salient facts of the case those facts can only be determined at the trial of the substantive matter.

7.0 Whether Defendant will suffer irreparable harm if Judgment by Default is set-aside.

7.1 It is not disputed that when Judgement by Default was entered parties were awaiting Ruling on the Inter-Parte Notice of Motion filed by the Defendant to dissolve the restraining Orders granted on 14 April 2005.

7.2 Defendants Summons for Assessment of Damage is yet to be heard which will require calling of expert witnesses such as qualified Accountant to testify

7.3 Also it must be noted that Plaintiff filed its Application within one month from the date Judgement by Default was entered.

7.4 Whilst Plaintiff filed its Submissions in respect to Application to set Defendant on 21 November 2005, Defendant did not file its submission until 19 July 2006.

7.5 The delay in delivery of this Ruling **cannot** be attributed to either party.

7.6 I am satisfied that in view above findings Defendant will not suffer an irreparable damage if the Judgement by Default is set-aside.

8.0 Conclusion

8.1 I am satisfied that the Plaintiff/Applicant has established that it has a defence on merits which has some prospect of success and if the Default Judgment is set- aside Defendant will not suffer any irreparable harm.

8.2 Accordingly I made the following Orders:-

- (i) Judgment in Default of Defence to Counterclaim entered on 29 June 2005 against the Plaintiff be set-aside on following conditions;
 - (a) Plaintiff to file Reply to Defence and Defence to Counterclaim within fourteen (14) days from the date of this Ruling.
 - (b) Plaintiff pay Defendant's cost summarily assessed at \$1000.00 within fourteen (14) days from date of this Ruling.
- (ii) If the Plaintiff fails to comply with the conditions stated in paragraph 8.2 (i) (a) and (b) of this Ruling Judgement in Default of Defence to Counterclaim entered on 29 June 2005 be re-instated and Defendant be at liberty to proceed with Summons for Assessment of Damages dated 12 July 2005.

Delivered at Suva this 19th day of June, 2013.

.....
K. Kumar
JUDGE

Solicitors:

Solicitors for Plaintiff - Fa & Associates

Solicitors for Defendant - Sharma and Associates