IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

HBC No. 179 OF 2012

BETWEEN : **VATUKOULA GOLD MINES LIMITED** and **KOULA MINING COMPANY LIMITED** both limited liability companies having their registered office and place of business at Vatukoula

PLAINTIFFS

AND : **KALAVETI TUKUTUKULEVU** of VGML Quarters MLO2, Church Road, Vatukoula.

DEFENDANT

R U L I N G

INTRODUCTION

1. Before me is a Summons dated 18 January 2013 by Muskits Law for the defendant seeking the following Orders:

    (i) that judgement in default of defence entered in this Court against the defendant on 15 October 2012 be set aside.
    (ii) the execution of the said judgement be stayed until final determination of the application.
    (iii) the pursuit of any and/or all proceedings arising from and/or in connection with the said judgement be stayed until final determination of this application.
    (iv) costs of and incidental to this application be costs in the cause.

2. The application is filed pursuant to Order 19 Rule 9 of the High Court Rules 1988 and is supported by an affidavit sworn by the defendant on 18 January 2013.

3. The defendant was formerly employed at the Vatukoula Gold Mines by VGML and then KMCL for a total of 18 years. He was dismissed on 04 July 2012.

DEFENDANT'S CASE

4. On 29 September 2011, some ten months before his dismissal, the defendant had been injured in an accident at the workplace. He fractured his leg as a result. He says he is still undergoing therapy, treatment and reviews at the Lautoka Hospital for the fracture. He annexes to his affidavit marked "A" a copy of a Medical Certificate which confirms his ongoing therapy and treatment after dismissal. The defendant is advised by his doctor and lawyer that when a workman is injured in the work place in the way that he was, the

employer is duty bound to facilitate treatment until the workman is fit to resume duty. He alleges that the plaintiff overlooked his injuries and the surrounding circumstances leading to it. They are also neglecting their duty to facilitate his recovery. The defendant alleges that the plaintiff did in fact orchestrate his dismissal on 4 July 2012 based on a flimsy allegation of bribery against him. He annexes to his affidavit marked **"B1"** and **"B2"** documents originating from the plaintiff setting out the allegations and the dismissal letter of 4 July 2012.

5. He also deposes that there are pending separate proceedings now initiated in the Labour Tribunal concerning the circumstances of the plaintiff's dealing with his dismissal.
6. He believes that the plaintiff had orchestrated the disciplinary charges and proceedings and ultimately, the termination in order to evade its responsibility to rehabilitate him and in order to set him up for lawful eviction under the Housing Agreement. He further deposes as follows:

> ...I have lived in the Plaintiff's quarters but have not signed a Housing Agreement even although I have faithfully obliged myself to the payment of all dues levied by the company for my tenure of Quarters ML02.
>
> ...my wife has also been an employee for subsequent owners of Vatukoula Gold Mines until to date for altogether 18 years.
>
> ...at present she travels to work from Quarters ML02 and has been a faithful employee of the Plaintiff.
>
> ...I have not moved from the Quarters ML02 because my wife who is an employee of the Plaintiff, without a Housing Agreement, can continue to fulfil the Plaintiff's obligation as regards housing.
>
> ...it is unreasonable to insist on my eviction from Quarters ML02 because
>
> a. my wife as an employee can continue to fulfil housing obligations as stipulated above.
> b. furthermore the unity of the family unit should also be a corporate responsibility.
> c. I have suffered disability since my injuries working in the Mines and I need my spouse's attention to my injuries at regular intervals.
> d. my wife should not be discriminated against as an employee for her entitlement to quarters.
>
> ...because of my current state of affairs I was not able to formally engage a solicitor so I attempted to attend to this matter in the High Court. My inability to gauge the process involved resulted in the Default Judgment issued by this Honourable Court on 15th October 2012.
>
> ...I have now formally engaged my current solicitors to attend to the reinstatement of this matter.
>
> ...I am advised and I verily believe such advice to be true that I have a meritorious defence to the claims proffered in the Writ and Statement of Claim and a copy of the Draft statement of Defence is accordingly attached as **Annexure "C"** herein.
>
> ...I pray that this Honourable Court grant the orders sought in this application.

PLAINTIFF'S OPPOSITION

7. The plaintiff opposes the application by an Affidavit of Akesh Sharma[1] sworn on 6 February 2013. Sharma confirms that the defendant was employed by VGML from 02 September 2009 to 05 July, 2012 and that the defendant was injured at the workplace on 29 September, 2011. Following that injury the defendant was on leave from 29 September 2011 to 26 February 2012 during which time VGML paid him his full wages.
8. On 29 February 2012, the defendant was cleared for light duties by the company doctor[2]. On 11 April 2012, the defendant was reviewed at Lautoka Hospital Orthopaedic Clinic where he was again recommended light duties[3]. He resumed work on 29 February 2012 and he was put on light duties from that time until his dismissal.
9. After the defendant was injured, he was taken to Tavua Hospital in transport provided by VGML and thereafter was transferred to Lautoka Hospital. While attending regular checkups, the defendant's transport costs were paid by VGML until he was fit to resume his duties. The defendant had not advised VGML of any other medical or treatment expenses incurred while being treated.
10. Sharma denies that the plaintiffs overlooked the defendant's injuries or that the defendant suffers from any disability. He says that the plaintiffs did facilitate the defendant's recovery and the defendant resumed work with VGML only after he was cleared for light duties.
11. He says that the defendant was dismissed for allegations of bribery for which he was accorded a full hearing at which he was found guilty of the offence[4]. He says that in a letter dated 09 July 2012 which the defendant wrote to the General Manager of VGML, the defendant admitted the offence and sought forgiveness[5].

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[1] Sharma is the Human Resources Manager in the employ of VGML which was formerly known as Emperor Gold Mining Company Limited (hereinafter EGM).
[2] He annexes to his affidavit the relevant part of the defendant's medical folder kept at VGML marked **AS-1**.
[3] Copy of the Lautoka Hospital Medical Report dated 2 July 2012 annexed to his affidavit marked **AS-2**.
[4] He annexes the record of disciplinary proceedings marked **AS-3**.
[5] A copy of the said letter is annexed and marked **AS-4**.

12. Sharma admits that the defendant has issued proceedings against VGML dealing with his dismissal from employment. He says though that the issues therein are not concerned with the matters herein.
13. Sharma admits that housing benefits were extended to the defendant subject to his employment with VGML. The defendant was employed with VGML under a contract of employment dated 21 October, 2009. Clause 25 of the said contract provided that VGML may provide housing to the defendant but there was no automatic entitlement to occupy any of VGML's houses. VGML did provide the defendant housing under a housing agreement dated 12 November, 2009. The housing agreement specifically provided that the house was left to the defendant until the tenancy is terminated by the termination of the contract of service[6]. The defendant's contract of service was terminated with effect from 05 July, 2012 and the tenancy was terminated. He was required to vacate the quarters within 7 days of the notice[7]. The defendant therefore has no right to occupy the said premises.
14. Sharma admits that the defendant's wife Kalesi Tukutukulevu has been an employee of VGML since 25 April 2008 and that she stays with him at present at Quarters ML02. However, neither the defendant nor his wife has any right to stay in the house. The defendant's wife is employed with VGML under a contract of employment dated 26 October 2009. The said contract is similar to that of the defendant's and provides that there is no automatic entitlement to housing. The defendant's wife has been staying in the house pursuant to the housing agreement between the plaintiff and the defendant which contract has now been determined.
15. He says the writ of summons was served on the defendant on 17 August 2012. The defendant did not file a defence to the claim for about two months from that date and a judgment in default was signed on 15 October 2012. A copy of the default judgment was served on the defendant on 18 October 2012. No action was taken by the defendant for a month.
16. On 16 November 2012, copies a letter of particulars were served on the defendant and other occupants requesting them to vacate the premises failing which a writ of possession will issue without further notice. Thereafter on 21

[6] A copy of the said housing agreement signed by the defendant is annexed and marked EAL-3 of the Elizabeth Laufenboeck affidavit.
[7] A copy of the said notice can be found at annexure "EAL-4" of the Elizabeth affidavit.

November 2012 the defendant's solicitors wrote to VGML's solicitors advising that they will pursue setting aside default judgment. VGML's solicitors replied on 23 November 2012 advising them of VGML's stand.

17. The application to set aside was filed on 18 January 2013 after a delay of about further two months.

18. Sharma says that no explanation is given by the defendant as to why he did not file a defence for about two months and waited for another two months before applying to set aside default judgment after it was obtained. After the default judgment was obtained, the plaintiffs have proceeded to obtain leave to issue a writ of possession at a cost and were in the process of executing it. The plaintiffs have taken steps since the default judgment was obtained and will face detriment and prejudice should it be set aside. He further deposes as follows:

    As to paragraph 17 and 18 of the said affidavit:

    a) I have been advised by my solicitors that the proposed defence does not show any defence on merits.
    b) The defendant admits that he may be disentitled to housing because of his dismissal.
    c) The defendant admits that there is no housing agreement with the wife.
    d) I deny the rest of the contents thereof.

    I pray that the defendant's application be dismissed with costs.

DEFENDANT'S REPLY

19. In his reply, the defendant asserts that there was no break in his total period of employment at Vatukoula, even though the ownership of the company may have changed hands. He questions the circumstances in which he was given medical clearance in detail, hinting that he was coerced into resuming light work duties against doctor's advice. He opines that "the current proceedings need to be suspended until the terms and conditions of the contract which enumerates his entitlement are first dealt with by the Employment Relations Tribunal". He also explains that he wrote the letter he wrote to the employer asking for forgiveness in order to clear his conscience. And he did that without legal advice. I imagine the truth or otherwise of this allegation is something that will be determined by the Employment Relations Tribunal.

THE LAW

20. A default judgement entered irregularly must be set aside as of right. However, where the default judgement had been entered regularly, the following must be borne in mind by the applicant/defendant:

The Rule

(i) the defendant must establish a prima facie defence or a meritorious defence.

- ***Evans v Bartlam***
- ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A.***

(ii) he need not establish his defence.

- ***Evans v Bartlam***

(iii) establishing a prima facie defence means showing an affidavit of merits i.e. one which states facts which discloses a prima facie defence.

- ***Fiji Sugar Corporation Limited v Ismail*** *[1988] FJCA 1; [1988] 34 FLR 75 (8 July 1988).*
- ***Farden v. Richter*** *(1889) 23 Q.B.D. 124.*

(iv) an arguable defence is not enough. What is required is a defence which has a real prospect of success and which carries some degree of conviction. In other words, one which will enable the court to form a provisional view of the probable outcome of the case.

- ***Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 22.cited with approval in Wearsmart Textiles Ltd v General Machinery Hire Ltd*** *[1998] FJCA 26*; ***Abu0030u.97s (29 May 1998) and Suva City Council v Tabu [2004] FJCA 42; ABU0055.2003S (16 July 2004).***

  "(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."

(v) a draft defence is not required.

- ***Fiji Sugar Corporation Limited v Ismail***

(vi) there is no rule that the defendant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default. However, this is something which the Court can consider in the

exercise of its discretion whether or not to set aside the default judgement .

- ***Fiji Sugar Corporation Limited v Ismail***
- ***Wearsmart Textiles Ltd v General Machinery Hire Ltd*** *[1998] FJCA 26;* ***Abu0030u.97s (29 May 1998) citing the following from the White Book, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143***

"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)."

Exception to the Rule

(vii) if the defendant does not have an affidavit of merits, no setting aside order ought to be granted "except for some very sufficient reason".

- See ***Wearsmart Textiles Ltd v General Machinery Hire Ltd*** *[1998] FJCA 26;* ***Abu0030u.97s (29 May 1998)*** wherein the Fiji Court of Appeal cited the following passage from the Supreme Court Practice 1997 (Volume 1) at p.143.

"Regular judgment -If the judgment is regular, then it is an (almost) 13/9/5 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). "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).

(my emphasis)

CONCLUSION

21. The authorities say that the defendant must show by affidavit evidence a defence which has a real prospect of success and which carries some degree of conviction. In other words, one which will enable the court to form a provisional view of the probable outcome of the case. There is a case pending before the Employment Relations Tribunal to deal with the defendant's termination from employment with the plaintiff. In the circumstances, I think it proper not to comment on the relative strength or otherwise of the defendant's case before the Tribunal. Suffice it to say that the provision of

housing is a term of the defendant's employment contract with the plaintiff. The defendant's employment contract was purportedly terminated by the plaintiff. The propriety of that action is currently under review before the employment relations tribunal.

22. It was not argued by counsel as to whether instituting these proceedings is an "abuse of process, given the pendency of the related matter before the Employment Relations Tribunal. Case law authorities are abound that, where a matter is pending before a specialist tribunal created by statute (e.g. the Agricultural Tribunal)" it is an abuse of process to institute proceedings in the High Court which should be put before that specialist tribunal – notwithstanding the original jurisdiction of the High Court. And flowing from that, if it is so an abuse of process, whether a default judgement entered in the High Court in such proceeding is therefore irregular and should be set aside as of right. I leave this for another day.

23. For now, I exercise my discretion in favour of the defendant after considering all. The default judgement is set aside. Costs in the cause. Case adjourned to 16 October 2013 before the Master for mention.

....

Anare Tuilevuka

JUDGE

25 September 2013.