

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 216 of 2013

**BETWEEN :** **DIGICEL (FIJI) LIMITED**a limited liability company duly incorporated in Fiji and having its registered office at 1<sup>st</sup> Floor, Kadavu House, 414 Victoria Parade, Suva

**PLAINTIFF**

**AND :** **UNIVERSITY OF THE SOUTH PACIFIC STAFF UNION**a trade union duly registered pursuant to the Trade Unions Act [ Cap, 96] and having its registered office at Laucala Bay, Suva.

**DEFENDANT**

**BEFORE :** Master Thushara Rajasinghe

**COUNSEL :** Mr. Katia P. for the Plaintiff  
Mr. Sharma N. for the Defendants

**Date of Hearing :** 8<sup>th</sup> July, 2011

**Date of Ruling :** 14<sup>th</sup> November, 2014

## **RULING**

### **A. INTRODUCTION**

1. The Defendant filed this Summons together with the affidavit of Litiana Waqalevu pursuant to Order 13 Rule 10 of the High Court Rules, seeking following orders inter alia:
  - i. *That there be a stay of execution of the default judgment entered against the Defendant on 4<sup>th</sup> of September 2013,*
  - ii. *That the Default judgment so entered in this matter be set aside and the Defendant be given unconditional leave to defend the within action,*

*iii. That cost of the Application be costs in the cause,*

2. Upon being served with this Summons, the Plaintiff appeared in court on 18<sup>th</sup> of February 2014, where they were given directions to file their affidavit in opposition. Accordingly the Defendant filed an affidavit of Mr. Vijesh Prasad, the Head of Customer Operation and Finance of the Plaintiff's company. Subsequent to the filing of the affidavits, this Summons was set down for hearing on the 8<sup>th</sup> of July 2014, where counsel for the Plaintiff and the Defendant made their respective oral arguments and submissions. At the end of the hearing, both counsel tendered their respective written submissions. Having carefully considered the respective affidavits, and submissions of the parties, I now proceed to pronounce my ruling as follows.

#### **B. BACKGROUND**

3. The Plaintiff instituted this action by way of a writ of summons dated 18<sup>th</sup> of July 2013 together with their statement of claim. The Plaintiff then filed an affidavit of service on 16<sup>th</sup> of August 2013. There was no acknowledgment of service filed by the Defendants, wherefore; the Plaintiff entered a default judgment against the Defendant on 4<sup>th</sup> of September 2013. The Defendant then filed this Summons to set aside the said default judgment entered against them.

#### *Defendant's Case,*

4. Having carefully considered the affidavit in support of the Defendant and the submissions of the learned counsel for the Defendant during the course of the hearing, it appears that the Defendant's application to set aside this default judgment constitutes two components. The first is the irregularity of the default judgment. On the ground of irregularity, the Defendant contended that they were not aware of this action against them until they were served the default judgment entered against them. Accordingly, it appears that the Defendant's contention of irregularity is founded on the ground of defective service of the writ of summons. The second component is that the Defendant has a

meritorious defence with real prospect of success and carries some degree of convictions.

*The Plaintiff's Case,*

5. The Plaintiff dines the allegation of irregularity. Mr. Prasad in his affidavit deposed that the writ of summons was served on the Secretary of the Defendant at their office as the University of the South Pacific. Having stated the factual background of this dispute and the Defendant's liabilities, Mr. Prasad further deposed that the Defendant has no meritorious defence.

C. THE LAW

6. The Plaintiff has entered this default judgment against the Defendant pursuant to Order 13 rule 1 on the ground of Defendant's failure to give notice of intention to defend within the prescribed time. The Defendant made this Summons for set aside the said default judgment pursuant to Order 13 r 10, where it states that:

*" Without prejudice to rule 8 (3) and (4), the court may , on such terms as it think just, set aside or vary any judgment entered in pursuant of this order".*

7. The founding principle of the jurisdiction of setting aside a default judgment has precisely expounded by Lord Atkin in his widely acclaimed passage in Evans v Bartlam (1937) A.C.437 where his lordship outlined that *" 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 "*.
8. The Default judgments have been divided into two categories as regular and irregular judgments. Fry L.J in Anlaby and others v Peatorius (1888) Q.B.D. 765, held that *"There is a strong distinction between setting aside a judgment for*

*irregularity in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular, has been obtained through some slip or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief.*

9. In this instance case, the Defendant's alleged irregularity is that they were not aware of this proceedings until they were served the default judgment by the Plaintiff and contented that they were not properly serve the writ of summons. The Plaintiff denies the allegation and contented that the writ was served on the secretary of the Defendant at their office at University of the South Pacific. None of the parties provided any other evidence in order to substantiate their respective claims on the issue of defective service of the writ. Under such circumstances, the only available evidence that this court has to rely on is the affidavit of service filed by the Plaintiff on 16<sup>th</sup> of August 2013. In the event of lack of legal submissions from the counsel on the issue of defective service of the writ, I, on my own volition decided to venture beyond the contentions of the parties to scrutinise the proper procedure of personal service of the writ under the High Court Rules.
10. Mr. JosefaGinigini filed the affidavit of service dated 1<sup>st</sup> of August 2013, where he deposed that he served the Defendant personally with a true copy of the writ of summons at University of the South Pacific Campus, Laucala Bay Road, Suva on the 24<sup>th</sup> of July 2013. It appears from the affidavit of service, that the Plaintiff has elected the personal service of the writ of summons pursuant to order 10 r 1 (1).
11. The manner of effective personal service of a document has stipulated under Order 65 r 2, where it states that;  
  
*"Personal service of a document is effected by leaving a copy of the document with the person to be served".*

12. In this instance case the Plaintiff is not a natural person, it is a trade union which has been registered under the Trade Union Act which has now been replaced by the Employment Regulation Promulgation in 2007( hereinafter referred as the Promulgation). A trade union which has registered under the Employment Regulation Promulgation or under the then Trade Union Act is considered as a body corporate pursuant to section 146 and 265 (10) of the Promulgation. Accordingly, the Defendant which is a dully registered trade union under the repealed Trade Union Act is a body corporate pursuant to the section 146 and 265 (10) of the Promulgation.

13. Order 65 r 3 (1) provides the procedure to effectively execute the personal service of a document on a body corporate, where it states that;

*“ Personal service of a document on a body corporate may, in cases of which provision is not otherwise made by any enactment, be effected by serving it in accordance with rule 2 on the mayor, chairman or president of the body, or the town clerk, secretary, treasurer or other similar officer thereof”.*

14. There is no specific provision provided under the Promulgation for the service of documents, beside the section 147 (4) which provides the procedure to serve documents required to be serve under the provisions of the promulgation. Hence, the applicable rule for the service of Writ of Summons on the Defendant in this instance case is Order 65 r 3 (1), if the Plaintiff elected to serve the writ personally.

15. The Plaintiff is required to file an affidavit of service to confirm that they have dully served the writ on the Defendant. In this respect, Order 65 r 8 has stipulated the requirements of an affidavit of service, where it states that;

*“ Except as provided in Order 10, rule 1 (3) (b) and Order 81, rule 3 (2) (b), an affidavit of service of any document must state by whom the document was served, the day of the week and the date on which it was served where it was served and how”.*

16. In view of Order 65 r 8, the Plaintiff is required to depose in their affidavit of service that they have served the writ of summons to a person as specified under Order 65 r 3. However, the affidavit of Mr. Ginigini has not specifically deposed that to whom he served the writ. It is only deposed that the writ was personally served on the Defendant. Under such circumstances, though Mr. Prasad in his affidavit claimed that the writ was served on the secretary of the Defendant, it appear from the affidavit of service filed by the Plaintiff that the writ of summons has not served as required under Order 10 r1 (1), Order 65 r 2 and 3(1) and Order 65 r 8.
17. Having considered the reasons discussed above, I accept the allegation of the Defendant that they were not properly served the writ of summons and was not aware of this action until they were served the default judgment. Accordingly, it is my conclusion that this default judgment dated 4<sup>th</sup> of September 2013 has entered irregularly without effectively serving the writ of summons on the defendant as required by the rules. Wherefore, this court has no discretion to refuse this application for set aside.
18. In my conclusion, I make following orders that;
- i. The Default Judgment entered against the Defendant on 4<sup>th</sup> of September 2013 is hereby set aside unconditionally,
  - ii. The Defendant is granted cost of \$1000 assessed summarily.

Dated at Suva this 14<sup>th</sup> day of November, 2014.



R.D. It. Thushara Rajasinghe  
Master of High Court, Suva