

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 59 of 2011L

**BETWEEN** : **CARPENTERS (FIJI)** a limited liability company having its registered office at Suva and trading in the name and style of Carpenters Shipping having its head office at Suva and branches in Lautoka and Nadi Airport.

**PLAINTIFF**

**AND** : **MEICHEAL BHINNU G. JALAM** and **ARUNA WATI JALAM** both of opposite Hari Prasad Shop, Bavadra Road, Lautoka, Unemployed and Domestic Duties

**FIRST DEFENDANTS**

**AND** : **SARITA BAI MAKANJEE** trading as **MAKANJI INVESTMENT** market square, Sigatoka Town, Sigatoka.

**SECOND DEFENDANTS**

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Solicitor for Plaintiff : Suresh Maharaj  
Solicitor for Defendant : Haroon Ali Shah

## **R U L I N G**

### **INTRODUCTION**

1. Before me is an application to set aside default judgement. After carefully considering the issues raised in the statement of claim, it is my decision that the judgement entered by default in this case was an irregular judgement and should be set aside as of right.

### **THE STATEMENT OF CLAIM**

2. The statement of claim in this case filed by Carpenters Fiji Limited ("**Carpenters**") alleges, *inter alia*, fraud, forgery and misrepresentation and deceit against the first defendants.
3. Carpenters is a registered Customs, Shipping and Forwarding agent. A core part of this aspect of its business is to attend to customs clearance for its clients.
4. At all material times, the first defendant ("**Meichael**") was employed by Carpenters as Senior Customs Supervisor in Lautoka. Meichael's spouse, the first defendant ("**Aruna**"), was a business woman in Sigatoka. She too, was client of Carpenters'. From time to time, Aruna

would utilise the services of Carpenters in clearing with Customs her consignments from abroad.

5. The second defendants, Sarita Makanjee and Makanjee Investments (“**Makanjees**”) were also clients of Carpenters’. On 30 January 2011, a consignment of theirs arrived in Fiji from China, and upon which the Makanjees approached, and engaged Carpenters, to assist them in clearing this consignment with Customs. At Carpenters, the Makanjees were attended to by Meichael who then lodged all relevant documentation to FIRCA. In due course, FIRCA would assess duty at \$10,005-00. This assessment was communicated to the Makanjees through Meichael.
6. As pleaded, the Makanjees were not able to raise the funds quickly to clear the duty. By February 2011, they were only able to clear the \$7,000 freight-charge. As a result, their consignment was held at the Lautoka Wharf by Customs where a daily storage charge was accruing, over and above the outstanding duty.
7. What Meichael allegedly did thereafter is the basis upon which the allegations of fraud, forgery, misrepresentation and deceit are founded.

#### **MEICHAEL’S CONDUCT**

8. According to the claim, while the Makanjees’ consignment was being withheld by customs, they (Makanjees) were liaising with Meichael who kept assuring them that “**the matter was under control**”.
9. On 25 March 2011, the Makanjees approached Meichael with \$15,000 to clear the outstanding duty. However, Meichael refused to accept the money. Instead, he “demanded” \$21,000 of the Makanjees.
10. The impression I get from the pleadings is that Meichael had represented to the Makanjees that \$21,000 was the total amount that had accumulated on account of outstanding duty as well as other charges.



11. On 30 March 2011, five days after the Makanjees were turned away by Meichael, the Fiji Islands Revenue & Customs Authority auctioned off the Makanjees' consignment on account of uncleared duty.
12. The plot thickens yet, for who was to turn up at the auction but Meichael, who bid personally and in his wife's name. In fact, Meichael's and Aruna's bid would turn out to be the "winning" bid. Their bidding price was mere \$12,000-00, a rather modest amount compared to the \$18,000 that the Makanjees had been prepared to pay and certainly, compared to the \$21,000 that Meichael had demanded of the Makanjees.
13. But the plot gets even more thicker yet! What Meichael did at the auction was pay a deposit of \$200-00 (two hundred dollars) only. He would return a day later on 31 March 2011 to settle the balance with a cheque of more than \$11,000. To cap it all off, the said cheque presented to FIRCA in the sum of \$11,000-plus was a Carpenters-cheque.
14. On paragraph 15 of the Statement of Claim, Carpenters describes how Meichael had, allegedly, set about to procure that cheque as follows:

*..on 31/03/2011, the 1<sup>st</sup> named 1<sup>st</sup> Defendant (i.e. Meichael) by suing his position, forged, altered and tampered with Fiji Islands Revenue & Customs Authority short payment advice No. 27192, misrepresented to other Plaintiff's staffs and through deceitful means caused a cheque to be drawn on the Plaintiff's account in the sum of \$11,000-00 (ELEVN THOUSAND DOLLARS) and took the same to pay for the release of the consignment which the 1<sup>st</sup> named 1<sup>st</sup> Defendant had bid in the auction in the name of himself and his wife. The 1<sup>st</sup> Defendants used the Plaintiff's cheque to purchase the consignment under auction.*
15. The rest of the statement of claim sets out allegations of how Meichael then tried to cover his tracks from Carpenters when he was caught out but it is not necessary for me at this time to discuss these.

#### **DEFAULT JUDGEMENT**

16. The writ of summons and statement of claim were filed on 15 April 2011. On 18 April 2011, Messrs Haroon Ali Shah filed an *Acknowledgement of Service*. On 13 May 2011, just short of a month after the statement of claim was filed, the plaintiff entered a search of the Court file and having found that no statement of defence had been filed, entered *Judgement By Default*

on the same day. On 22 June 2011, just a little over a month (five weeks) after *Judgement By Default* was entered, the plaintiff filed a *Notice of Assessment of Damages* returnable 30 June 2011. On 30 June 2011, the return date for the *Notice of Assessment*, Mr. Degei appeared for the defendants and sought another date. On the same day, Mr. Degei also filed a *Summons to Set Aside Default Judgement*.

#### PRINCIPLES

17. The principles for setting aside default judgement are settled. A default judgement entered irregularly must be set aside as of right. However, where default judgement had been entered regularly, the defendant must show an affidavit of merits in order to succeed in setting aside the default judgement (see *Fiji Sugar Corporation Limited v Ismail* [1988] FJCA 1; [1988] 34 FLR 75 (8 July 1988)). In doing so, he only need establish a prima facie defence. He does not need to establish his case (*Evans v Bartlam*). What is required is an affidavit disclosing a prima facie defence. A draft defence annexed to an affidavit will not be enough if the affidavit relies solely and entirely on the draft defence to establish a prima facie defence – although - there is no harm, albeit it is not necessary as the Fiji Court of Appeal has said in *Fiji Sugar Corporation Limited v Ismail*, in attaching a draft defence so long as other material are annexed to or deposed in the affidavit which, together or separately, in themselves, are sufficient to establish a prima facie case.
18. The Fiji Court of Appeal in *Wearsmart Textiles Ltd v General Machinery Hire Ltd* [1998] FJCA 26; Abu0030u.97s (29 May 1998) said that an affidavit of merits is required. As to what is meant by "affidavit of merits" – the Court held that what is required is "*an affidavit stating facts showing defence on the merits*".

#### OBSERVATIONS

19. I agree with the argument of Mr. Degei. The default judgement was irregular. I say it was irregular because the nature of the allegations make this a claim within the class that is within the purview of Order 19 Rule 7.



20. Order 19 Rule 7 states as follows:

**Default of defence: other claims (O.19, r.7)**

7.-(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.

(2) Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant, then, if one of the defendants makes default as mentioned in that paragraph, the plaintiff may-

(a) if his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or

(b) set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down on motion for judgment, against the other defendants.

(3) An application under paragraph (1) must be by summons or motion.

21. I am of the view that in cases where fraud is alleged such as the present, and considering that fraud is a triable issue, a default in serving a defence cannot be followed by judgement without an Order of this Court. The Plaintiff should have lodged a formal application by summons or motion pursuant to Order 19 Rule 17, for judgement.

**ORDERS**

22. Accordingly, I set aside the default judgement. No Order as to Costs. Case adjourned to **25 August 2015 at 10.30 a.m.** for directions on the filing of pleadings.



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Anare Tuilevuka

**JUDGE**

10 August 2015.