

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 67 of 2017

BETWEEN : LACHMAIYA GANESH of Lot 43 Makoi Stage 3 Nasinu, Civil Servant.

PLAINTIFF

AND : SUN (FIJI) NEWS LIMITED a limited liability company having its registered office in Suva.

1ST DEFENDANT

AND : PETER LOMA address unknown to the Plaintiff, Publisher.

2ND DEFENDANT

AND : JONE LUVENITOGA address unknown to the Plaintiff,
Photographer.

3rd DEFENDANT

AND : JESSICA GOUNDER address unknown to the Plaintiff,
News Reporter.

4th DEFENDANT

EFORE : Master Vishwa Datt Sharma

COUNSEL : Ms. Naidu for the Plaintiff
Mr. Emmanuel Narayan for the Defendants

Date of Ruling : 08th May, 2018

RULING

[Summons seeking Setting Aside of Interlocutory Judgment AND leave to file and serve Acknowledgment of Service and Statement of Defence by the 1st Defendant pursuant to Order 19 Rule 9 and Order 3 Rule 4, Order 32 Rule 9 (d), Order 13 Rules 8 & 10 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court Respectively]

A. INTRODUCTION

1. The 1st Defendant filed **Summonses** on 12th and 15th May, 2017 respectively and sought for the following orders -

(i) Setting Aside of Interlocutory Judgment:

- (a) That the Interlocutory Judgment entered on 10th May, 2017, against the First Defendant be set aside;
- (b) That the First Defendant be at liberty to defend the Writ of Summons including the Statement of Claim filed on 09th March, 2017 by filing a Statement of Defence within 14 days of the order for setting aside herein; AND
- (c) That cost of this Application be paid by the Defendant.

(ii) Leave to file and serve Acknowledgment of Service and Statement of Claim:

- (a) FOR AN ORDER that the First Defendant do have leave to file and serve Acknowledgment of Service and Statement of Defence in respect of the Writ of Summons and the Statement of Claim filed on 09th March, 2017;
- (b) AND/OR FOR AN ORDER that all incidental and consequential directions be given in respect of the filing of the Acknowledgment of Service and Statement of Defence.

2. **Both Summons** were filed together with an Affidavit in Support deposited by the 1st Defendant Peter Lomas.

3. The Application were made pursuant to *Order 19 Rule 9 and Order 3 Rule 4, Order 32 Rule 9 (d), Order 13 Rules 8 & 10 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court Respectively.*

4. The applications were opposed by the Plaintiff and affidavits in opposition were filed by the Plaintiff, Lachmaiya Ganesh.

5. Both counsels representing the parties to this proceeding filed their written submissions and accordingly argued their respective cases.

B. BACKGROUND FACTS

6. The Plaintiff filed and commenced a Writ action against the Defendants on 09th March, 2017. The substantive issue alleges "Defamation" on the part of the Defendants and claims for General and Exemplary Damages with other reliefs as set out in the prayer of the Plaintiff's substantive Statement of Claim.

7. The process server namely, Navishal Narayan filed an affidavit of service confirming the manner of service effected on the 1st Defendant, by **personally serving the Security Guard at the Fiji Sun Office in Walu Bay**. Further, there is no evidence of any service effected on the remaining Defendants, 2nd, 3rd and 4th Defendants.

8. The 1st Defendant failed in its bid to file and serve his Acknowledgment of Service and any **Statement of Defence** which subsequently resulted in the Plaintiff successfully obtaining an **Interlocutory Judgment** pursuant to *Order 19 Rule 3 of the High Court Rules, 1988* against the 1st Defendant.
9. The **Interlocutory Judgment** was filed on 02nd May, 2017 and sealed on 10th May, 2017. Later on 12th May, 2017, the Interlocutory Judgment was served on one Maraia Vuula at the Fiji Sun Office at 12 Amra Street Walubay, Suva.
10. Subsequently, the 1st Defendant's Counsel conducted a file search with the High Court Civil Registry on this file and filed an Acknowledgment of Service on 15th May, 2017 and a Statement of Defence on 22nd May, 2017 behalf of the 2nd, 3rd and 4th Defendants.
11. Hence, applications for setting Aside the Interlocutory Judgment and Leave to file and serve Acknowledgment of Service and Statement of Defence simultaneously for determination.

PRINCIPLES ON SETTING ASIDE DEFAULT JUDGMENT

12. *Order 19 Rule 9 of the High Court Rule, 1988 deals with Setting Aside Judgment and states as follows:*

9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

13. Under **Or.19 r.9** the Court may set aside or vary 'any judgment' unconditionally or on terms.
14. The Court has a very wide discretion in an application of this nature but it is also guided by certain well known principles.

One of the principles 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". (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473).

15. The basic principles applicable to setting aside judgments in the exercise of Court's discretion are set out in **Halsburys Laws of England Vol 37 4th Ed. para 403**, inter alia, thus:

"In the case of a regular judgment, 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 or a triable issue"

C. JUDGMENT LEAVE TO FILE AND SERVE ACKNOWLEDGMENT OF SERVICE AND STATEMENT OF CLAIM:

16. *Order 3 Rule 4 of the High Court Rules, 1988 deals with Extension:*

4.-(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

17. *Order 32 Rule 9 (d) deals with Jurisdiction of Registrar:*

(d) Extension or enlargement of time;

18. *Order 13 Rules 8 & 10 deals with Proof of Service of Writ*

8. (1) Judgment shall not be entered against a defendant under this Order unless-

(a) the defendant has acknowledged service on him of the writ; or

(b) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or

(c) the plaintiff produces the writ indorsed by the defendant's solicitor with a statement that he accepts service of the writ on the defendant's behalf.

Order 13 Rule 10 deals with setting aside:

10. Without prejudice to rule 8(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

E. ANALYSIS and DETERMINATION

19. This is the 1st defendant's Summons filed on 15th May, 2017 to **set aside Interlocutory Judgment** filed on 02nd May, 2017 and entered and sealed against him on 10th May, 2017.

20. This application is made on the ground of **irregularity** since the 1st Defendant is alleging that the procedure followed by the Plaintiff in obtaining the **interlocutory judgment** was incorrect because the Plaintiff's Claim is based on "**Defamation**" against the newspaper Company which is classed as an **unliquidated claim**. For this reason, Interlocutory Judgment should be set aside on the basis that it is an irregular judgment instead. He further submitted that the order for Judgment was obtained in terms of **Order 19 Rule 2** which applied to a liquidated claim.

21. The application is made pursuant to **Order 19 Rule 9** of the **High Court Rules, 1988**.

22. The Plaintiff obtained the **Interlocutory Judgment** in terms of **Order 19 Rule 3 of the High Court Rules, 1988**.

23. The Plaintiff filed and commenced the Writ action against the Defendants on 09th March, 2017. The substantive issue alleges "**Defamation**" on the part of the Defendants and claims for General and Exemplary Damages with other reliefs as set out in the prayer of the Plaintiff's substantive Statement of Claim.

24. According to the Plaintiff and as confirmed by the affidavit of service of process server, Navishal Narayan that the 1st Defendant was served with the Writ of Summons by serving a copy with the security officer at the Fiji Sun office. It is unclear whether the remaining Defendants mentioned in the Writ were also served the same way or that the Plaintiff did not have the intention to serve the remaining Defendants rather decided to proceed against the 1st Defendant only.

25. However, the 1st Defendant failed to file and serve his respective Acknowledgment of Service and the Defence as was required of him in terms of **Order 18 Rule 18(2) of the High Court Rules**,

1988. As a result, Interlocutory Judgment was entered against the 1st Defendant only on 10th May, 2017.

26. At this stage of the proceedings, it must be borne in mind and the 1st Defendant should have been aware that the entry of Interlocutory Judgment obtained in absence of any Defence simply means that the liability has been established by the Plaintiff. The onus of proving the Damages as sought for in the substantive claim for "Defamation" remains with the Plaintiff at the hearing of the **Assessment of Damages, which is yet to be filed by the Plaintiff.**
27. It cannot be denied by both parties to this proceeding and it is my view that the **Interlocutory Judgment in Default of Defence** entered against the 1st Defendant on 10th May, 2017 is a **regular judgment.**
28. The leading authority on an application **setting aside the default judgments** is the old English decision *Evans v Bartlam [1937] AC 473*. The primary and secondary considerations described in that decision have been approved and adopted in Fiji by the Court of Appeal in several decisions including *The Fiji Sugar Corporation Limited v Mohammed Ismail* [1988] 34 Fiji LR 75; *Wearsmart Textiles Limited v General Machinery Hire Limited* and *Shareen Kumar Sharma* (unreported), Fiji Court of Appeal, Civil Appeal No. ABUO030 of 1997, a decision dated the 29th of May, 1998 (their honours Sir Moti Tikaram, President; the right Honourable Sir Maurice Casey, and the Honourable Justice J. D. Dillon presiding) and more recently *Suva City Council v Meli Tabu* (unreported), Fiji Court of Appeal, Civil Appeal No. ABUO055 of 2003 delivered on the 16th of July, 2004. (Their honours Eichelbaum, Penlington and Scott).

The principles are:

- (a) As a primary consideration there must be before the court an affidavit from the defendant or associated person properly deposing and demonstrating a meritorious defence.
- (b) As secondary consideration the affidavits and submissions must advance adequate reasons as to why the judgment was allowed to be entered by default.
- (c) The affidavit and submissions must confirm that a substantive application was made promptly or explain with adequate reasons why there was a delay in making the application.
- (d) The plaintiff should depose and submit in reply as to any prejudice or irreparable harm that will be suffered if judgment is set aside.

Why Interlocutory Judgment was allowed to be entered by default?

29. According to the 1st Defendant, the Writ of Summons was served by the process server by leaving a copy with the security officer at the Fiji Sun office and was not served as was required in terms of the law by leaving a copy of the same at the counter of the Registered office of the Sun (Fiji) News Limited. Prima facie there appears to be a doubt whether the security officer had handed over the Writ of Summons to the registered office of Sun (Fiji) News Limited or not, has not been established to court.
30. However, the 1st Defendant failed to file and serve his respective Acknowledgment of Service and the Defence as was required of him in terms of *Order 18 Rule 18(2) of the High Court Rules, 1988*. As a result, Interlocutory Judgment was entered against the 1st Defendant only on 10th May, 2017.

31. Lord Atkin in *Evans v Bartlam* (1937) 2 All E.R. 646 at 650 which is apt:

"It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. 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 been obtained only by a failure to follow any of the rules of procedure."

32. I will accept the 1st Defendants explanation in terms of the manner of the service of the writ of Summons on the 1st Defendant accordingly.

Meritorious Defence?

33. Whether the 1st Defendant has demonstrated **meritorious Defence?**

34. The exercise of the **discretion** is **wide** and **unfettered** as until the Court has **pronounced judgment** upon the **merits or by consent** it must have the power to **revoke** a **default judgment** obtained by a failure to follow any of the rules of procedure (*Evans supra*). Any **defence** described in the affidavits supported by the submissions must have a **real prospect of success** and carry a degree of conviction allowing the court to form a provisional view of the probable outcome of the action.

35. This requires the court to scrutinize the **defendant's affidavit** to see whether it contains deposed facts which will support a **meritorious defence** that is one with a **reasonable chance of success** (*Wearsmart Textiles (supra)*, *Suva City Council (supra)* and *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd's Reports 221).

36. According to the 1st Defendant, the draft **Statement of Defence** establishes clear **merits** since the article published was not defamatory in nature and were not intended or understood to mean that the Plaintiff is accused of committing sexual offences and faces criminal proceedings as alleged. Further, neither there are any of the imputations arising from the publication of the photograph to be defamatory. The 1st Defendant has continuously publicly apologized accordingly.

37. The Plaintiff submitted that the 1st Defendant doesn't have any Defence and Peter Lomas {2nd defendant's} affidavit admits that there was a publication and that news article relating to Govind Sami being charged for rape contained the photograph of the Plaintiff, Ganesh. He added that the reason as to how the photograph of the Plaintiff was published and there was no intent on the part of the Defendants may become factors for assessment of Damages, but in terms of liability there is no Defence as such.

38. In the instant case, both parties cannot deny the fact that the **Interlocutory Judgment** obtained by the Plaintiff was not on **merits** but on **default of pleadings** upon the non-filing of the **Defence**. **The matter did not proceed to a hearing in order to obtain judgment against the Defendant.**

39. It is my view and I tend to agree with the 1st defendant that the nature of the claim including the substantive issue of alleged "Defamation" should have been proved with formal evidence on merits. It was rather entered summarily on affidavit evidence and the court did not have the opportunity of assessing the oral and documentary evidence in order to determine the case in a just and fair manner.
40. Bearing in mind these circumstances in my view require judgment to be accordingly set aside (**Beale v Macgregor**, 2 T.L.R. 311). Although the judgment was regular but not on merits, there is an affidavit of merits i.e. an affidavit stating facts showing a substantial ground of defence [**Farden v Richter** (1889), 23 Q.B.D. 124].
41. On facts showing a defence the following statement of **Lord Denning M.R.** in **Burns v Kondel** (1971) 1 Lloyd's Rep. 554 at 555 is apt:

"We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue."

42. Upon a careful perusal of the Draft **Statement of Defence** coupled with Affidavit evidence and written submissions, I find that the 1st Defendant has **established** having a **meritorious Defence** in the matter. Further, I also find that there are both **triable** and **legal issues** that need to be determined on oral evidence to reach a fair and just decision. Therefore, the Interlocutory Judgment needs to be set aside in order to allow the Defendant to Defend this action accordingly.

Delay?

43. The Interlocutory Judgment was filed on 02nd May, 2017 and sealed by this court on 10th May, 2017. Five (5) days later the 1st Defendant filed his applications seeking setting aside of the Interlocutory Judgment. The Plaintiff has accepted and acknowledged that there has not been any unreasonable delay by the 1st Defendant to bring this application for the court's determination.
44. I agree with the Plaintiff and accordingly find that the application was filed within a reasonable timeframe.

Prejudice?

45. The substantive action was commenced in March 2017. The Acknowledgment of Service and the Defences have already been filed and the 1st Defendant has also shown a meritorious Defence bearing in mind the nature of the substantive claim faced by the Defendants.
46. The Plaintiff has acknowledged and admitted that there is no delay in filing and seeking aside the Interlocutory Judgment entered on 10th May, 2017.
47. The parties can expedite the cause of action to allow for the matter be heard and determined expeditiously. Therefore any question of prejudice will not set in and will be alleviated accordingly.

E. In Conclusion:

48. Upon a careful considering of the affidavit evidence before me and the oral and written submissions from both counsels in the proceedings, I find that the 1st Defendant has shown and established a meritorious Defence in the matter.
49. In all the circumstances of this case I adopt the following 'headnote' from *Maclairin v Little* (1906) 9 G.L.R. 348:
- "Where judgment by default was entered by the plaintiffs, and it appeared that a slip had been made as to the time within which a defence ought to have been filed, and the affidavit filed by the defendant showed a good defence to the action, the judgment was set aside at defendant's cost, defendant to have liberty to file a defence within four days, failing which the judgment was to stand."* (Underline mine).
50. In exercise of Court's discretion, the 1st Defendant is at liberty and granted leave to defend the substantive action and that the Interlocutory Judgment entered on the 10th May, 2017 ought to be set aside accordingly.
51. For these reasons, the Interlocutory judgment is ordered to be set aside forthwith. The 1st defendant is granted leave to Defend and file an Acknowledgment of Service and the Statement of Defence within 21 days from the date of this order failing which the Interlocutory Judgment will remain intact.
52. I summarily assess and fix the costs of this summons against the 1st defendant in the sum of \$500.00 to be paid within 21 days to the Plaintiff.

FINAL ORDERS

- (i) The 1st Defendants Summons seeking the setting aside of the Interlocutory Judgment entered against the 1st Defendant on 10th May, 2017 succeeds.
- (ii) The 1st Defendant is granted leave to defend the Writ of Summons including the Statement of Claim filed on 09th March, 2017 by filing an Acknowledgment of Service and the Statement of Defence within 21 days timeframe on or before 29th May, 2018 @ 4 pm.
- (iii) The 1st Defendant is ordered to pay costs summarily assessed of \$500 to the Plaintiff within 21 days.
- (iv) For further directions to be made in terms of the Substantive action.
- (v) Orders accordingly.

Dated at Suva this 08th May, 2018




Master
VISHWA DATT SHARMA

cc:

A. P. Legal, Suva
Patel Sharma Lawyers, Suva