

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

CIVIL ACTION NO.: HBC 76 of 2017

**BETWEEN** : **AHMED HUSSEIN** **PLAINTIFF**  
**AND** : **HERRY'S CONSTRUCTION LIMITED** **DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF** : Ms J Lal [Neel Shivam Lawyers]  
**DEFENDANT** : Mr R Dayal [Nawaikula Esquires]  
**RULING OF** : Acting Master Ms Vandhana Lal  
**DELIVERED ON** : 11 October 2018

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**INTERLOCUTORY RULING**  
[Setting Aside Interlocutory Judgment]

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1. Ahmed Hussein instituted proceedings against Herry's Construction Limited by filing a writ of summons on 23 March 2017.

The claim was for damages - special and general with post and future economic loss for injuries sustained whilst in employment with the Defendant.

2. As per the affidavit of service filed on 12 May 2017, the writ of summons was served on Herry's Construction Limited on 11 April 2017 at 10:10am by one Jope Tikoisuva of 125 Milverton Road, Suva a registered bailiff.

He effected service by leaving a copy of the writ of summons at the Defendant's registered office at Khalsa Road, Newton.

Mr Tikoisuva further goes on to depose that he had also on 3 May 2017 at 10:51am personally serve one Hari Deo the Director of Defendant company. This service was also effected at Khalsa Road, Newton.

3. On or about 1 June 2017, the Plaintiff's counsel filed a praecipe and search to seal default judgment.

Accordingly on 20 July 2017, an Interlocutory Judgment was entered as follows:

*“No acknowledgement of Service having being filed by the above-named Defendant. It is this adjudged that Judgment is entered against the Defendant to pay the above named Plaintiff Special Damages in the sum of \$978.00 (Nine Hundred Seventy Eight Dollars) with further damages, interest and costs which is made up as follows:*

<i>Filing of Writ of Summons</i>	-	<i>\$109.00</i>
<i>Filing Praecipe and Judgment</i>	-	<i>\$59.95</i>
<i>Bailiff Fee</i>	-	<i>\$30.00</i>
<i>Solicitor Fee</i>	-	<i>\$43.60</i>
		<b><u>\$242.55</u></b>

4. Following this, the Plaintiff on 29 November 2017 filed a notice of assessment of damages and costs.

Said notice was served on the Defendant on 9 January 2018.

5. On or about 16 March 2018, the Defendant’s Counsel made application to set aside the Interlocutory Judgment so entered on 20 July 2017 and also seeking further orders that the notice of assessment of damages be stayed.
6. Mr Hari Deo Narayan Director in the Defendant company, informs he received the notice of assessment of damages and cost by one of his family members who was present at his house when it was served.

Thereafter he instructed his solicitors to attend to the mater and defend for the company.

He did not have any documents in relation to this matter hence his solicitors conducted a search of the file with the High Court Civil Registry. Accordingly, they were able to obtain copies of the documents.

He informs that the search showed that a writ of summons and statement of claim was filed against the company; an Interlocutory Judgment was entered and that there was no acknowledgment of service filed by the company.

Accordingly to Mr Narayan, the Plaintiff was obliged to serve the writ of summons and statement of claim on one of the Directors at the registered office of the company at Khalsa Road, Suva.

He believes the company has a good and meritorious defence.

He will be prejudiced if the interlocutory judgment and notice of assessment is not set aside.

7. The Defendant informs the writ of summon was served at the registered office and also personally served on Mr Hari Deo Narayan who is the director of the company.

Accordingly, Mr Narayan was aware of the writ of summons.

He further states that the Defendant company had a valid Workers Compensation Policy with Dominion Insurance covering the Defendant's liability regarding accidents at workplace.

Upon enquiring with the Insurer his solicitors were advised that the Defendant had claimed from it a sum of \$5,490.40 being claim for workmen's compensation payable to the Plaintiff. He has annexed a Memorandum of Agreement dated 24 March 2017. This sum has not been paid to the Plaintiff.

8. As per the summons, the application to set aside the judgment is made under Order 19 rule 19 of the High Court Rules. However one will note that there is no Order 19 rule 19 in the High Court Rules.

What the Defendants would have meant was Order 19 rule 9.

However Order 19 deals with default of pleadings by a party.

9. The Interlocutory Judgment so entered was in default of non-filing of acknowledgment of service. Hence Order 13 rule 10 is the correct process.

10. The Plaintiff had entered a judgment pursuant to Order 13 rule 2 which reads:

*"Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any."*

11. Order 13 rule 10 allows court *"on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order"*.

12. Pursuant to Order 12 rule 1 a defendant may acknowledge service of a Writ.

Sub rule (1)(3) clearly asks for the Defendant to acknowledge service of a writ by *"properly completing an acknowledgement of service defined by rule 2 by making a copy of it and handing in at the Registry out of which the Writ was issued. The acknowledgement of service together with the copy made thereof"*.

13. Order 65 deals with requirement for service of documents.

In particular Order 65 rule 3 deals with requirement of service of document on a body corporate and it reads:

*(1) Personal service of a document on a body corporate may, in cases for 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.*

(2) *Where a writ is served on a body corporate in accordance with Order 10, rule 1(2), that rule shall have effect as if for the reference to the usual or last known address of the defendant there were substituted a reference to the registered or principal office of the body corporate and as if for the reference to the knowledge of the defendant there were substituted a reference to the knowledge of a person mentioned in paragraph (1)*

14. Hari Deo Narayan has not denied/opposed the claim by the Plaintiff that the writ of summon was served both at the registered office and on him personally.
15. After service of the writ, the Defendant had 14 days to acknowledge service and file its intention to defend – order 12 rule 4.
16. The writ was served on 03 May 2017 on Hari Deo at Khalsa Road, New Town. The 14<sup>th</sup> day expired on 16 May 2017.
17. A praecipe was not filed until 01 June 2017 and an interlocutory judgement not entered until 20 July 2017.
18. I find that the judgment so entered was a regular judgment.
19. The Deputy High Court Judge Kwok SC in **Universal Bank v Deep Sea Seafood Trading Limited [2015] HKCFI 2279; HCA 1213 of 2015 (17 December 2015)** held that:

*On an application to set aside a regular default judgment, the major consideration is whether the defendant has shown a defence on the merits to which the court should pay heed, not as a rule of law, but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication, Hong Kong Civil Procedure, 2016, para 13/9/13. It is not sufficient to show a merely "arguable" defence that would justify leave to defend under order 14. The defendant must show that he has "a real prospect of success". To do so, he must satisfy the court that his case and the evidence that he adduces in support of it is potentially credible and carries some degree of conviction, Hong Kong Civil Procedure, 2016, para 13/9/14.*

20. Locally the Court of Appeal in the case of **Fiji Sugar Corporation Limited v Mohammed Ismail [1988] FLR 12**, relied on Lord Atkin in House of Lords whilst laying out the principle on which Courts act whilst dealing with an application to set aside a judgment.

*"Lord Atkin in the House of Lords case Evans v. Bartlam (1937) 2 All ER p. 646 at p.650 said:-*

*"I agree that both R.S.C. Ord. 13, r.10, and R.S.C., Ord. 27, r. 15; gives a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The*

*courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the application must produce to the court evidence that he has a prima facie defence. 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, 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."*

21. Apart from stating that *"the company has a good and meritorious defence and that he will be prejudiced if the interlocutory judgment and notice of assessment is not set aside"*, Mr Narayan has failed to show Court a defence which discloses an arguable or triable issue.
22. Accordingly I find that the Defendant's application cannot succeed and is dismissed.
23. The Defendant is further ordered to pay a cost summarily assessed at \$850. Said cost is to be paid to the Plaintiff in <sup>14</sup>days from today.
24. The earlier order for stay of the notice for assessment of damage is vacated.



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**Vandhana Lal [Ms]**  
 Acting Master  
 At Suva.