IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

High Court Appeal No. 04 of 2018

BETWEEN : **KAKS MARKETING (FIJI) LIMITED** a duly registered liability company having its registered office at 12 Autocity Place, off Grantham Road, Raiwaqa, Suva.

APPELLANT
(Original Defendant)

AND : **NEW INDIA ASSURANCE COMPANY LIMTIED** a duly incorporated company having a registration in Fiji and with its principal Fiji office at Harifam Center, Suva.

REPONDENT
(Original Plaintiff)

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. S Chandra for the Appellant
: Ms B. Qioniwasa for the Respondent

Date of Hearing : 29 July 2019
Date of Judgment : 30 April 2020

JUDGMENT

APPEAL: PRACTICE Default judgment – Late attendance in court by the defendant's counsel – particulars sought by the defendant not provided by the plaintiff – Court's discretion to set aside default judgment – Order XXXIV Rule 3 of the Magistrate Court Rules

The following case is referred to in this judgment:

a. Evans v Bartlam [1937] AC 473 at 480

---

1. This is an appeal of the order dated 16 November 2017 by the Magistrate Court of Suva refusing to set aside its default judgment dated 12 June 2017. This followed the appellant's failure to file a statement of defence, and the absence of its counsel when the matter was taken up in court for formal proof. Default judgment was entered on the same day. The matter was set for formal proof after the appellant's counsel failed to be in court on the previous day, 5 June 2017. The appellant's grievance is that its counsel had arrived late in court when the matter was called at the earlier than usual time of 8.30 am on 12 June, while the registry had informed it that the matter would be taken up at 9 am.

2. The appellant contended that a statement of defence was not filed as it had been seeking from the respondent copies of the alleged dishonored cheques in order to determine whether or not they had been dishonored. The respondent filed this action to recover a sum of $15,621.56, claiming it as the balance due for insurance policies issued to the appellant during the years 2010 and 2012.

3. The appellant's grounds of appeal are that the learned Magistrate erred in law (a) in finding that the respondent would be severely prejudiced and would suffer irreparable harm if the judgment entered by default on 12 June, 2017 is set aside; (b) in finding that the appellant's explanation for his failure to enter an appearance to the writ was unsatisfactory when the default judgment entered on 12 June 2017 was not obtained by the respondent during the court's normal sitting time from 9:00 - 9:30 am onwards and, instead, judgment was delivered at the "unusual time of 8:30am"; (c) by failing to consider the appellant's proposed defence i.e: that the money claimed by the respondent had already been paid by the said appellant by

way of a cheque; (d) in delivering the ruling, on 16 November 2017, on the appellant's application to set aside the default judgment, no notice of an adjourned ruling was issued or served upon the defendant, and that the matter had been fixed for ruling on 8 December, 2017.

4. The appellant's original grounds of appeal filed on 10 January 2018 were amended by grounds of appeal filed on 15 May 2018. The Magistrate's order dated 16 November 2017 is said to have been received by the appellant on 18 December 2017.

5. It was submitted for the appellant that the respondent's claim is based on four dishonoured cheques which were not returned to the appellant, that payment of the arrears of premiums were made to the respondent by Westpac Bank on behalf of the appellant on 10 December 2010, and that the sum of $17,909.86 was paid through the appellant's bank in response to the invoice dated 23 November 2010 related to the renewal of insurance for the period 22 September 2010 to 22 September 2011. The contention of the appellant is that the four postdated cheques which were said to have been presented to the bank on 17 January 2011 were not produced in court, and that not even copies of the cheques were made available for the appellant's inspection though requests to this effect were made to the respondent. This, it was submitted, did not allow the appellant to verify whether payment was made or not.

6. Explaining the default, it was submitted on behalf of the appellant, that on 5 June 2017, on which day counsel for the appellant was not present in court, the matter was adjourned to 12 June 2017 at 8.30 am. The Resident Magistrate, thereupon, set the matter down for formal proof at 8.30 am and notice of adjourned hearing was issued to the appellant for 12 June 2017. However, it subsequently emerged that the notice of adjourned hearing issued by the court registry listed the case at 9 am on 12 June 2017 and not at 8.30 am as directed by the Magistrate. Counsel submitted that the relevant notice issued by the court registry was in the possession of the appellant. Moreover, the appellant's counsel was informed by the court registry that the Magistrate would sit from 9.30 am onwards. For these reasons counsel submitted that the default judgment dated 12 June 2017 was irregularly obtained

and ought to be set aside, and that the appellant should not be punished for factors which were beyond its control.

7. The appellant also complained that on 14 November 2017, this order was fixed for 8 December 2017, but was delivered on 16 November 2017 without notifying the appellant. The court will not consider this aspect in view of the orders to be made relating to the other grounds of appeal.

8. An examination of the record shows this: on 8 December 2016, the matter was adjourned to 28 December 2016, on which day the appellant informed court that it has been seeking particulars from the respondent. On 16 January 2017, the respondent was given 21 days to provide further particulars to the appellant. On 21 February 2017, the matter was adjourned by court to 8 May 2017, when it was adjourned again for the parties to take instructions, additional information and for possible settlement. On 30 May 2017, the matter was adjourned again, on this occasion due to the Magistrate's absence, to 5 June 2017 at 9 am. On that day, counsel for the appellant was not present and the matter was set down for formal proof at 8.30 am on 12 June 2017. The learned Magistrate's minute for 12 June records the absence of the defendant, and enters judgment in default in the sum of $15,364.26. In addition, costs were awarded. The matter was taken up again at 9.45 am on the same day, when lawyers for both parties were present. From what is obvious, the respondent's counsel did not consent to vacating the default judgment, which was stayed until 16 June 2017. Thereafter, the parties filed papers and the court proceeded to hear the appellant's application to set aside the default judgment. The order refusing to set aside the default judgment was made on 16 November 2017.

9. It was submitted on behalf of the respondent that if the default judgment is set aside, it would be severely prejudiced and would likely lose the interest that has accumulated since the date on which default judgment was entered, and that even if it succeeded in the matter eventually post judgment interest would be calculated afresh from the date of judgment.

10. Submitting that there were repeated delays on the part of the appellant, it was urged on behalf of the respondent that the appellant had no meritorious defence or an issue to be tried. It was submitted that the Magistrate made a finding that the court registry had served the notice of adjourned hearing to the appellant notifying it that court would sit at 8.30 am on 12 June 2017.

11. However, though the minutes of the Magistrate makes mention of such a notice to be issued to the appellant, this has not been made available to court. On the other hand, counsel for the appellant submitted that he has in his possession the registry's notice stating the time at 9 am on 12 June 2017 and not at 8.30 am, as claimed by the respondent; however, this also was not made available for the court's inspection. In the absence of the notice, whether the registry had made a mistake in notifying the time could not be verified.

12. Order XXXIV Rule 3 of the Magistrate Court Rules sets out the applicable provision where there is a default or failure by a party. The rule provides:

> "If a Plaintiff in a suit makes default or fails in fulfilling any interlocutory order, the court may, if it thinks fit, stay further proceedings in the suit until the order is fulfilled, or may give judgment of non-suit against such plaintiff, with or without liberty of bringing any other suit on the same grounds of action, or may make such other order on such terms as to the court shall seem fit.
>
> If a defendant in any suit makes such default or failure, the court may give judgment by default against such defendant, or make such other order as to the court may seem just:
>
> Provided that any such judgment by default may be set aside by the court, upon such terms as to costs or otherwise as the court may think fit".

13. The rule makes it clear that by exercising its discretion, the Magistrate Court *may* give judgment by default against the defaulting defendant, or make such other order as to the court may seem *just* in the circumstances of the case. This court must decide whether the discretion exercised by the Magistrate was apt, in the circumstances of the case.

14. In exercising its discretion the court would consider whether it is just in all the circumstances of the case to set aside the default judgment. An application to set aside such a judgment must be made without delay. The court will have regard to the merits of the case; that is, whether the appellant has a *bona fide* defence. Counsel for the appellant referred to the decision in *Evans v Bartlam*[1], where the House of Lords, referring to judgments obtained by default, opined that unless and until a judgment is pronounced upon the merits or by consent, the court could revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

15. The learned Magistrate has concluded that the appellant did not show an issue to be tried by court on the basis that the period for which the respondent made the claims – 2009 and 2010 – was not addressed in the appellant's proposed statement of defence. According to the respondent, the appellant's default relates to the period 2009 – 2010. Counsel for the respondent submitted that the letter by Wespac Bank made it clear that the payment was not for the period that was claimed, and that this was pointed out by the Resident Magistrate in his judgment. He submitted that the payment of $17,909.86 was in respect of totally different insurance policies.

16. In its proposed statement of defence, the appellant pleaded that the sum of $17,909.86 was paid by Westpac on the basis of invoice dated 23rd November, 2010 and the renewal of insurance premiums for the period 22 September 2010 to 22 September 2011. The reverse of the invoice submitted to court carries the legend "renewal premium from 22 September 2010 to 22 September 2011". Receipt dated 15 December 2010 issued by the respondent acknowledges payment of a sum of $17,909.86 from the appellant paid on its behalf by Westpac Bank. However, this receipt makes no mention of the period relating to the insurance premium.

17. The confusion relating to the period is evident in the proceedings of the formal proof, which makes reference to 2010 to 2012. Neither is the invoice helpful in setting out the period.

[1] [1937] AC 473 at 480

18. This dispute, it appears, even gave rise to a winding up notice served on the appellant by the respondent in August 2014. This was replied by the appellant's lawyers by letter dated 22 September 2014 disputing the sum demanded and drawing attention to four cheques that had not been returned. The letter called for confirmation that the cheque for 17,909.86 paid by Westpac Bank to the respondent on 10 December 2010 related to the renewal of six polices from 22 September 2010 to 22 September 2014; this period, however, is at variance with the period mentioned in the proposed statement of defence. The demand notice was for a sum of $15,317.01. In the affidavit filed in the Magistrate Court on 15 June 2017, by the appellant's accountant, Raagni Mudaliar, it is averred that the winding up proceedings against the appellant were discontinued at a point of time.

19. The burden of proving non-payment lies with the respondent. The weight of this burden must not be lightened merely by the delayed attendance in court of the appellant's lawyer, the delay itself having been occasioned by a possible misapprehension. Some credence must be given to the appellant's claim that the court may not have sat on that day at its usual time; this is not to place blame on the court's decision to sit at a time of its choosing or to condone the appellant's counsel's failure to be in court on time.

20. A consideration of these matters satisfies me that there is *prima facie* an issue to be tried by court on behalf of the appellant. I am of the view that it would be unjust to preclude the appellant from further participation in the proceedings merely because of its lawyer's failure to appear in court on time. That failure resulted in a delay of a little more than an hour, as the appellant's counsel was under a misapprehension that court would commence at its usual time and not at 8.30 am. By this, no intention to default can be seen; this, to me, appears material, in the circumstances of this case. The matter was again taken up at 9.45 am in the presence of counsel for both parties. I am not convinced that a litigant can be punished by barring him from all further participation in the proceedings in these circumstances. On the facts of this case, it is unsafe to allow the default judgment to stand. For these reasons, I am satisfied that the crux of the appeal can be allowed.

21. There may be some prejudice to the respondent as a result of this decision, particularly in the event the action in the Magistrate Court is decided in favour of the respondent, as pointed out in submissions on its behalf. But, that I feel is a matter that could be adequately addressed through the award of costs in the Magistrate Court.

Appeal allowed.

ORDERS

a) The default judgment dated 12 June 2017 entered by the Magistrate Court of Suva is set aside.

b) The order dated 16 November 2017 by the Magistrate Court of Suva is set aside

c) The case is remitted to be heard by another Magistrate in Suva.

d) The parties will bear their own costs.

Delivered at Suva this **30th** day of **April, 2020**

Justice M. Javed Mansoor
Judge of the High Court