IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 59 of 2018

BETWEEN

AMAN RAVINDRA-SINGH of Tukani Street, Lautoka, Fiji, Barrister and Solicitor.

APPLICANT [ORIGINAL DEFENDANT]

AND

JOSAIA VOREQE BAINIMARAMA of New Wing, Government Buildings, Suva, Prime Minister of the Republic of Fiji.

FIRST RESPONDENT [ORIGINAL FIRST PLAINTIFF]

AND

AIYAZ SAYED-KHAIYUM of Suvavou House, Victoria Parade, Suva, Attorney-General, Minister of Economy, Civil Service and Communications of Fiji.

SECOND RESPONDENT [ORIGINAL SECOND PLAINTIFF]

Counsel : The Applicant in person

Mr. D. Sharma with Ms. G. Fatima for the Respondents

Date of Hearing : 04th May 2020

Date of Ruling : 15th May 2020

RULING

(*On the Application to set aside the interlocutory Judgment*)

[1] The respondents (plaintiffs) instituted these proceedings against the applicant (defendant) seeking the following reliefs:

(a). Damages for libel and slander;

(b). Punitive, Exemplary and aggravated damages;

(c). An order that the defendant within 7 days render in writing a public retraction and apology in prominent print to the plaintiffs to be published in a daily newspaper circulating in Fiji;

(d). An order that the defendant immediately remove the subject article from his Facebook Page and be restrained from publishing or printing such similar article in any form of social media;

(e). Pre-judgment and post-judgment interest on any award of damages;

(f). Cost of this action on a substantial-indemnity basis inclusive of VAT; and

(g). Such other and further relief as this court may deem just.

[2] The respondents filed the affidavit of service of the Writ of Summons and the Statement of Claim on 18th October 2018. The applicant filed the Acknowledgement of Service on 31st October 2018 but he did not file his

statement of defence and the court entered interlocutory Judgment ordering the defendant to pay $320.60 as costs and damages to be assessed.

[3] On 28th November 2018 the plaintiff filed summons for assessment of damages and with the leave of the court it was served on the defendant by registered post.

[4] When the matter was mentioned on 04th March 2020 the hearing was fixed for 20th April 2020. On the day fixed for the hearing the applicant was absent but he was represented by a solicitor who sought time to file his submissions. The court granted time and the hearing was fixed for 04th May 2020. On 29th April 2020 the defendant filed summons to set aside the default judgment. In the said summons the applicant sought the following orders:

1. That there be a stay of execution of the default judgment entered against the Defendant on 27th day of November 2018.
2. That the default judgment so entered in this matter be set aside and the Defendant be given unconditional leave to defend the claim filed by the First and Second Plaintiffs; and
3. That costs in this application be costs in the cause.

[5] The application to set aside the interlocutory judgment was made pursuant to Orders 13 rule 10 and 19 rule 9 of the High Court Rules 1988.The applicant in support of his application also relied on order 14 of the High Court Rules 1988.

[6] Order 14 rule 1 of the High Court Rules 1988 provides as follows:

(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than-

(a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment,

(b) an action which includes a claim by the plaintiff based on an allegation of fraud.

(3) This Order shall not apply to an action to which Order 86 applies.

[7] In terms of Order 14 rule 1(2)(a) the provisions of order 14 have no application to actions for libel and slander. There is no dispute between the parties that the respondents instituted these proceedings to recover damages for libel and slander. Therefore, the above provisions have no application to this matter.

[8] Order 13 rule 2 of the High Court Rules 1988 provides:

> 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.

[9] In this action since the applicant has given notice of intention to defend the action Order 13 rule 2 has no application.

[10] Order 19 rule 3 provides:

> Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails 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, 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] It is common ground that the applicant did not file and serve his statement of defence. The respondents were therefore entitled to have the interlocutory judgment entered in their favour against the applicant.

[12] The applicant submits that the respondents have failed to follow proper procedure laid down in Order 14 rule 2 of the High Court Rules.

[13] As I have already decided above, the provisions of Order 14 rule 2 of the High Court Rules apply to every action begun by writ other than an action which includes a claim for libel, slander, malicious prosecution or false imprisonment. Hence there was no requirement for the respondents to follow the procedure laid down in Order 14 rule 2 of the High Court Rules.

[14] Order 19 rule 9 of the High Court Rules 1988 provides:

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

[15] Order 19 rule 9 confers a discretion on the court to set aside a judgment entered pursuant the Order 19. It is a well-established principle that in considering an application to set aside a judgment entered pursuant to Order 19 of the High Court Rules 1988 the court has to consider the following:

(i) the application to set aside must be in a timely manner and made without delay; and

(ii) the applicant must show that he or she has a defence on merits and this is usually done through affidavit evidence.

[16] In the case of **Woodstock Homes (Fiji) Ltd v Rajesh** [2008] FJCA 104; ABU0081.2006S (18 April 2008) the Court of appeal said:

> Order 19 Rule 9 of the High Court Rules provides that "*The Court may on such terms as it thinks fit just, set aside or vary any judgment entered in pursuance of this order*".
>
> The discretion is in its terms unconditional: see ***Evans v Bartlam*** (1937) 2 All ER 646 at 650.

In the case of **Evans v Bartlem** [1937] 2 All ER 646 the following were set out;

1. Unless and until the Court pronounces 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;
2. The Rules of Court give to the Judge a discretionary power to set aside the default Judgment which is in terms "unconditional" and the Court should not lay down rigid rules which deprive it of jurisdiction;
3. The primary consideration is whether the Defendant has a defence to which the Court should pay heed and;
4. There is no rigid rule that the Defendant must provide a reasonable explanation for delay in bringing the application but clearly this is a factor to which the Court will have regard in exercising its discretion to set aside a default Judgment.

In **Shocked v Goldschmidt** (1998) 1 All ER 372 at page 379 the Court of Appeal, after referring to various previous decisions, said:

> These cases relating to default judgments are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's both for the default and for any delay, as well as against prejudice to the other party.

[17] I will first deal with the issue of delay in making this application. The law clerk of Young and Associates, the Lautoka agent for plaintiffs' solicitors, states in his affidavit that on 25th January 2019 and 05th February 2019 he went to the applicant's law firm to serve the Summons for Assessment of Damages but on both occasions he was informed that the applicant was away

from office. This shows his office was aware of the fact that the respondents made attempts to serve the summons personally. The applicant does not say that officers of his law firm did not bring this to his notice.

[18] The respondents then moved court for leave to serve the Summons for Assessment of Damages on the applicant by registered post and the court granted leave. The summons for Assessment of Damages was posted on 28th February 2019 to the applicant. The applicant's position is that between 23rd and 24th February 2019 his post box was locked and when he inquired from the post office about his mail, he was told that all mails had already been returned to the senders. This in my view is not an excuse acceptable to the court for the reason that the plaintiff cannot be faulted for the locking the post box. It is also important to note that the applicant has conveniently suppressed from court the reason why his mail box was locked and subsequently sold to another person.

[19] On the other hand the applicant knew very well that there was a case pending against him in the High Court of Suva and that he did not file his statement of defence. It shows that he took no interest in inquiring from the Registry about the current status of the matter even after his post box was locked. *Vigilantibus Et Non Dormientibus Jura Subveniunt* which means, the law assists those that are vigilant with their rights, and not those that sleep thereupon, is a principle of law applicable universally.

[20] The applicant appeared before this court for the first time on 04th October 2019 and since then he had almost six months to file summons to vacate the interlocutory judgment but it took more than six months for him to file the summons. The court is mindful of the fact that Lautoka city was locked down for few weeks but he had enough time to file this summons before fixing the matter for hearing of the summons for assessment of damages. The applicant has failed to explain the delay in making the application to set aside the interlocutory judgment.

[21] The next issue is whether the applicant has a defence on merits. In the affidavit filed in support of the summons to vacate the interlocutory judgment the applicant has not averred any defence. The applicant however, has attached his proposed statement of defence to the affidavit in support but there is no defence averred in the proposed statement of defence.

[22] There are certain defences that can be taken in an action for damages for libel and slander. In this matter applicant has failed to take up any defence such as consent, fair comment or justification. All what he says is that he puts the respondents to strict proof of the averments in the statement of claim.

[23] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The application to set aside the interlocutory judgment is refused.
2. The applicant is ordered to pay the respondents $2000.00 as costs of this application.

Lyone Seneviratne

JUDGE

15th May 2020