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

CIVIL ACTION NO.: HBC 86 of 2017

**BETWEEN : ESALA VULA**

**PLAINTIFF**

**AND : MERCHANT BANK OF FIJI LIMITED** t/a Merchant Finance

**DEFENDANT**

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**APPEARANCES/REPRESENTATION**

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| **PLAINTIFF** | : | Mr A Bale on instructions [Nawaikula Esquire] |
| **DEFENDANT** | : | Mr R Singh with Mr S Fatiaki [Sherani & Co] |
| **RULING OF** | : | Acting Master Ms Vandhana Lal |
| **DELIVERED ON** | : | **30 March 2020** |

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# INTERLOCUTORY RULING

**[**Setting Aside Default Judgment**]**

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**The Application**

**1.** On 9th August 2017 an interlocutory judgment was sealed by the Chief Registrar's Office on the ground that no Notice of Intention to defend was filed. Damages were to be assessed.

**2.** The defendant now wishes to have the said judgment set aside and it be granted leave to defend the action.

The application is supported by an affidavit by Rowena Fong sworn on 27th April 2018.

**3.** The plaintiff filed his response to the application sworn on 31st July 2018. A reply by the defendant was filed on 17th October 2018.

**Brief History Of The File Since Inception Till The Filing Of The Application For Setting Aside The Default Judgment**

**4.** The plaintiff on or about 29th March 2017 filed a writ of summon. In his prayers the plaintiff sought orders as follows:

i. A declaration that the defendant acted unlawfully, and fraudulently by purposely and/or maliciously and recklessly changing its records to show that the plaintiff was in arrears when in fact he was not.

ii. For a declaration that the defendant acted fraudulently by repossession of the plaintiff's vehicles registration no. CV 255; DT 032; DV 299; DW 865; DW 866 and DY 609 and termination of fixed deposit of $33,881.25.

iii. And order directing the defendant to repay the plaintiff the full value of CV 255; DT 032; DV 299; DW 865; DW 866 and DY 609 and fixed deposit of $33,881.25 in the sum of $429,893.09.

iv. And order that the defendant pay the plaintiff punitive damages.

v. And order that the defendant pay the plaintiff exemplary damages.

**5.** An affidavit of service was filed on 30th March 2017. According to the server, he did on 29th March 2017 personally service the defendant with the writ of summon which service was accepted by the defendant.

**6.** The defendant on 5th April 2017 filed its affidavit of service.

**7.** The plaintiff's solicitors on 2nd August 2017 filed a search; praecipe and interlocutory judgment.

**8.** The interlocutory judgment was entered on 9th August 2017.

**9.** The said documents were served on the defendant on 10th August 2017. An affidavit of service was filed on 15th September 2017.

**10.** On or about 6th April 2018 the plaintiff's solicitors filed a summon for leave to assess damages.

The said application was listed for call on 2nd May 2018 when my predecessor made following notes:

> "*Perused both HBC 22 of 2012 and HBC 147 of 2014.*
>
> *In both order 18 rule 18 application plaintiff's case struck out.*
>
> *Mention for plaintiff to consult his counsel and await Senior Court Officer to issue defendant's application for setting aside order*."

**The Defendant's Contention**

**11.** The writ of summon so served was handed to the defendant's legal assistant to prepare an acknowledgement of service and locate the bulk files of the respective accounts that form part of the plaintiff's claim.

The respective files could not be located and presumed to have been destroyed as they only maintain bulk records that are less than 10 years old.

They had to seek assistance from Reddy & Nandan Lawyers solicitors formerly in carriage of the same matter but under action no HBC 147 of 2014.

The defendant was undergoing a corporate restructure; it did not have the relevant materials for the accounts and was without a solicitor and legal assistant. As a result it could not file the requisite pleading in time.

In Civil Action 147 of 2014, the Plaintiff's claim was stuck out as the claim made several allegation of fraud. The plaintiff has failed to pay the defendant cost of $1,500 as awarded in the said matter.

The plaintiff proceeded to file another action against the defendant with the same claim.

The defendant claims there are triable issues to be determined fairly at trial.

The judgment entered is irregular as section 16 of the Limitation Act precludes the plaintiff from instituting the within action.

The allegation in the Plaintiff's claim arose from 2001 or latest 2002 which is more than 6years which is out of the limitation period.

The plaintiff's action is an abuse of court's process as he has filed two actions previously.

The plaintiff took a loan from the defendant and the plaintiff defaulted in the repayment of the said loan. The defendant being the mortgagee exercised its rights to repossess the vehicle which was given as a security for the loan by the plaintiff and sell by way of auction to recover its debt.

**The Plaintiff's Argument**

**12.** The plaintiff's solicitor's clerk had notified the defendants twice via phone regarding the case. That after a delay of 5months the plaintiff entered the default judgment. The delay by the defendant is inexcusable.

According to the plaintiff, the issues were all part of civil action 147 of 2014 and therefore the defendant should have kept full and complete record.

In this new action the plaintiff is specifically pleading knowledge and motive which are requirements for pleading fraud.

The truck was his main source of income and due to repossession he has incurred loss financially.

**Law on Setting Aside Judgment**

**13.** In the instant case the defendant had failed to file its statement of defence.

An acknowledgement of service was filed on 5th April 2017.

However the interlocutory judgment so entered is in default of notice of intention to defend been filed and served.

**14.** The appropriate rule applicable is Order 19 rule 9 of the High Court Rules which reads:

> "*The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order*".

**15.** Pathik J. in **Chandra v. Rokoqica a Suva Civil High Court Action No. HBC 45 of 2000 (B)** held that in cases of a regular judgment and in application for setting aside *"there must be an affidavit of merit, i.e. an affidavit stating facts showing a defence on the merits."*

His Lordship further went on to cite passage from the Supreme Court Practice 1993, Order 13 rule 9 on page 137 to 138:

> *"the major consideration is where the Defendant has disclosed a defence on the merits, and this transcends any reason given by him on the delay in*

*making the application even if the explanation given by him is false [Vann – v- Awford (19680 83. L.S. Ciaz. 1725, The Times April 23 1986 C.A.]*

**16.** In **Pravin Gold Industry Limited T/As Govinda Vegetarian Restaurant v. The New India Assurance Company Limited a Suva Civil Action No. HBC 250 of 2002** delivered on 4 February 2003, Pathik J considered a summary of factors to be taken into consideration which is found under notes to Order 13 rule 9 of the Supreme Court Practice 1995 Volume 1 at page 142:

*"the purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has 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 cannot show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the Court will take into account the explanation of the defendant as to how the default occurred."*

**17.** 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.*

**18.** 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 excising 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."*

**Determination**

**19.** The defendant has explained the reason for delay in filing of its statement of defence.

**20.** I note there is a delay by 08 months since when the interlocutory judgment was entered and when the defendant made its application to set aside the judgment.

**21.** I have also taken judicial note of the two claims filed previously in Suva High Court Civil Action No 22 of 2012 and Suva High Court Civil Action No 147 of 2014 and the respective rulings on application for striking out.

**22.** Both the claims involved loan contract between the parties at different times for the purchase by the plaintiff of vehicles on sums loaned to it by the defendant and with each involving the furnishing of security.

**23.** As claimed in the previous two claims the plaintiff again in instant case is pleading several causes of action in fraud. (Paragraphs 17 and onwards). These allegations of fraud are linked to breach of contract. There are also allegation of fraudulent activities and deceit on the part of the defendant.

**24.** I would again repeat what my colleague Master Bull in her ruling of 9th December 2016 in HBC 147 of 2014 has stated:

a) As a fraud, deceit is a tort (Derry v Peek [1889] UKHL 1; (1889) 14 App Cas 337), the limitation period for which is stated by section 4 (1) (a) of Limitation Act Cap 35, to be 6 years from the date on which the cause of action accrued.

b) A cause of action in tort accrues from when the damage is first sustained. From the statement of claim, this would have been at the earliest, 2001 or latest, with the amalgamation of accounts in November 2003, and the seizure of vehicles shortly thereafter.

c) Clearly, whether the cause of action be for fraud in connection with breach of contract or for deceit, it is time barred under section 4 (1) (a) of the Limitation Act.

d) Section 15 of the Limitation Act however, provides for the postponement of the limitation period in cases of fraud and mistake with time beginning to run only from the time the plaintiff discovers the fraud or mistake, or could have with reasonable diligence discovered it.

**25.** As outlined earlier the Plaintiff has pleaded fraud.

**26.** In **Carpenters Fiji –v- Meicheal Bhinnis G. Jalam and others**. Tuilevuka J expressed his 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 defame cannot be followed by judgment without an order of this Court, the plaintiff should have lodged a formal application by summons or motion to order 19 rule 17 for judgment*."

**27.** I also find that the defendant have established a prima facie defence.

**28.** In the circumstances I find that the interlocutory judgment entered on 09 august 2017 ought to be set aside.

**Final Orders**

**29.** The interlocutory judgment entered on 09 August 2017 is hereby set aside.

**30.** The defendant is granted leave to file/serve its statement of defence in 14 days.

**31.** The plaintiff to file and serve his reply to statement of defence in 14 days thereafter.

**32.** Cost of the Application to be in cause.


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