

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

CIVIL ACTION NO.: HBC 147 of 2020/17 *sf*

BETWEEN : **EVERETT RILEY** **FIRST PLAINTIFF**
: **TAB SOUTH PACIFIC** **SECOND PLAINTIFF**
AND : **YATU LAU COMPANY LIMITED** **DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFFS : Mr J. Ulodulo [Bale Law]
DEFENDANT : Mr J Savou [Savou's]
RULING BY : Acting Master Ms Vandhana Lal
DELIVERED ON : 27 April 2022

INTERLOCUTORY RULING

Application

1. This is the Defendant's application for setting aside a judgment sealed on 04th July 2017.

The said application is made pursuant to Order 19 Rule 19 of the High Court Rules and is supported by an affidavit of Tomi Finau sworn on 05th September 2017.

2. The Plaintiff on 11th October 2017 filed an affidavit opposing the application by the Defendant. The Defendant filed its reply on 02nd November 2017.

Background of the Proceedings

3. On 24th May 2017, the Plaintiff initiated this action when it caused a writ of summon to be issued by the High Court Civil Registry.
4. As per the affidavit of service filed on 25th May 2017, the writ was served on the front desk clerk of Yatu Lau Company Limited at its office at Yatu Lau Arcade, Rodwell Road, Suva.

The server states that the clerk endorsed her name on the writ as Jiu Masivou.

5. On or about 03rd July 2017 a search with praecipe was filed.
6. On 04th July 2017 an interlocutory judgment was sealed against the Defendant.
7. On or about 14th July 2017 the Plaintiff's solicitors filed an application for assessment of damages.
8. This summon was served on the Defendant at its office on 27th July 2017.
9. On 28th July 2017 the Defendant's solicitors filed a notice of change of solicitors [which notice should have been notice of appointment of solicitors as there were no solicitors on record for the Defendant].
10. On 11th September 2017, the Defendant's solicitors filed the current application for setting aside the default judgment.

The Substantive Claim

11. The Plaintiff's claim against the Defendant is for refund of monies paid by the Plaintiffs to the Defendant for purchase of a Hotel situated at Nadi.
12. The Plaintiffs also claim damages for mental anxiety and belittlement for the manner the Defendant had unjustly enriched itself.

The Defendant's Contention

13. The Defendant acknowledges service of the interlocutory judgment and the summon for assessment of damages.

14. The Defendant denies the claim by the Plaintiff and states it has defence to the claim as follows:
 - a. *The First Plaintiff, on behalf of an entity called Namara Resources Limited, approached the Defendant for the acquisition of the Sunlover Hotel, and it denies that there was any contract or Sale and Purchase Agreement entered into between the Plaintiffs and defendant for the sale and purchase of the Sunlover Hotel at any time.*

 - b. *The Defendant admits that the Second Plaintiff paid the sum of \$62,000 to the Defendant, however it was not paid pursuant to any Sale and Purchase Agreement for the purchase of the Sunlover Hotel by the First or Second Plaintiffs but on behalf of Namara Resources Limited, an entity in which the First Plaintiff is a Director.*

 - c. *The Defendant admits that it received from the Second Plaintiff a Westpac Banking Corporation cheque for the sum of \$62,000 in the Fijian currency on behalf of Namara Resources Limited.*

 - d. *The Defendant admits that it received a letter from the First Plaintiff as Managing Director of Namara Resource Limited on 15th March 2011 requesting the refund of the \$62,000 paid on behalf Namara Resources Limited.*

- e. The Defendant had agreed to and refunded the amount received from the Plaintiff on behalf of Namara Resources Limited, save for a small remaining portion of around \$3,000 (three thousand dollars) which is yet to be uplifted from the Defendant.*
- f. The Defendant denies that there is any basis for the Plaintiff's claim of specific performance as there was no Sale and Purchase Agreement entered into between the Plaintiffs and the Defendant at any time.*
- g. The Defendant denies that it has been unjustly enriched.*

15. In reply to the opposition, the Defendant states that Mr Everett Riley as the Managing Director of Namara Resources requested for the refund of the monies.
16. Via a letter from R Patel Lawyers, the Plaintiffs were informed that the monies were refunded to Namara Resources Limited giving out details of payments made. A total sum of \$59,000 was paid with balance of \$3,000 remaining.

The Plaintiff's Argument

17. The first Plaintiff states he had issued a cheque for a sum of \$62,000 to the Defendant as deposit for purchase of Sunlover Hotel.
18. The sale did not go through and the Defendant agreed to refund the \$62,000 to the Plaintiffs.
19. Via a letter of 22nd November 2010, the lawyers for the Defendant admitted that it had on 01st July 2010 received \$62,000 from the Plaintiffs and further admitted that since the sale did not go through they will refund the said money.

20. The Defendants have failed to explain to the court why there has been a delay in filing an acknowledgment of service and a statement of defence.
21. On 30th January 2017, the Defendant was served with a demand notice by the Plaintiff's solicitors to which the Defendant failed to respond.
22. The Defendant has failed to annex any payment vouchers for monies it claims to have refunded to the Plaintiffs.

Law

1. The Court of Appeal in the case of **Fiji Sugar Corporation Limited v Mohammed Ismail [1988] FLR 12**, whilst laying out the principle on which court act whilst dealing with an application to set aside a judgment relied on Lord Atkin in *Evans v Bartlam* (1937) 2 ALL Er 646 at 650 who had stated:

"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."

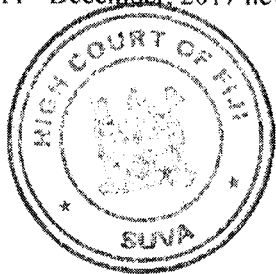
Determination


23. In this action the judgment was entered in default of defence when it should have been in default of notice of intention to defend.
24. In any event the principle applicable for setting aside for judgment entered under Order 13 and Order 19 are the same that is the Defendant needs to show meritorious defence; explain reason for delay and prejudice caused to Defendant if not set aside and if set aside prejudice to the Plaintiff.
25. I agree with the Plaintiffs that the Defendant has failed to provide this Court with good reasons why it defaulted in filing of its notice of intention to defend and later a statement of defence.
26. There is a delay of 04 months between the service of the writ and filing of the current application and delay of 2 months since entering of the interlocutory judgment.
27. In its affidavit and draft statement of defence the Defendant have raised a meritorious defence that is they paid monies \$59,000 to Namara Resources Limited and only a sum of \$3,000 is outstanding.
28. Neither party addressed in their affidavit how they will be prejudiced should the judgment be set aside or not set aside.

29. For the delay caused I find the Plaintiffs can be compensated with cost and with the meritorious defence being raised I find the default judgment ought to be set aside.

Orders

30. The judgment sealed on 04th July 2017 is set aside.
31. The Defendant is to pay the Plaintiffs cost summarily assessed at \$1,000 and to be paid by 27 May 2022 4pm;
32. The Defendant is to file/serve its statement of defence by 27 May 2022 4pm.
33. The Plaintiffs are to file/serve their reply to defence by 03 May 2022.
34. The Plaintiffs application for assessment of damages is dismissed together the motion dated 11th December, 2017 new solicitors are on board for the Plaintiffs).




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Vandhana Lal [Ms]
Acting Master
At Suva.

27 April 2022

TO:

1. Suva High Court Civil Action No. HBC 147 of 2017;
2. Bale Law, Solicitors for the Plaintiffs;
3. Savou's, Solicitors for the Defendant.