

IN THE HIGH COURT AT SUVA IN THE CENTRAL DIVISION
CIVIL JURISDICTION

HBC: 76/23

BETWEEN: **FMF FOODS LIMITED**

PLAINTIFF/RESPONDENT

AND: **DIYAN RAJ CHAUHAN t/a RAJ CHAUHAN**
ENTERPRISE

DEFENDANT/APPLICANT

Date of Hearing : **5th September 2023**
For the Appellant: **Mr. Matanitobua I.**
For the Respondent: **Mr Dayal R. A.**
Date of Ruling : **9 October 2023**
Before : **Levac SLTTW, Acting Puisne Judge**

R U L I N G
(APPLICATION TO SETASIDE INTERLOCUTORY JUDGMENT)

Motion

1. The Applicant had filed an Notice of Motion seeking the following Orders:

- (i) *That the Interlocutory Judgment filed on the 2nd day of May 2023 be set aside upon the grounds set forth in the Affidavit of Dhan Raj Chauhan sworn and filed herein and the matter be stayed pending the final hearing and determination of this application.*

- (ii) *That all proceedings against the Defendant be stayed until final determination of this motion; and*
- (iii) *That Cost of this application be cost in the cause.*

Background

2. A Writ of Summons was issued from the High Court on 15 March 2023. The Writ of Summons was served on 25 March 2023 to the Defendant.
3. The Claim is for a credit facility offered and accepted by the Defendant for products purchased from the Plaintiff totaling \$170,149.73.
4. The Defendant issued a number of cheques that were later claimed to be dishonored.
5. On the 25th of April 2023 the Defendant filed their Acknowledgement of Service intending to contest the proceedings.
6. On the 2nd of May 2023 a Search for the Statement of Defence was filed and thereafter on the same date, an interlocutory judgment was sealed for the sum claimed.
7. The Applicant/Defendant now seeks to set aside the interlocutory judgment on the basis that Statement of Defence was rejected by registry on the basis it was out of time despite an Acknowledgement of Service being filed.

Affidavits

8. The Applicant had filed his Affidavit in support as follows –
 - '8. That before the 14 days my solicitors went to file the Statement of Defence but it was refused over the counter.
 - 9. That I have a meritorious defence in this matter and my Statement of Defence is ready for filing and leave could be granted to file and serve the same on the Plaintiff.
 - 10. That I will be prejudiced and denied natural justice in this matter if I am not heard.
 - 11. That the court of law should allow me to present my case and give me an opportunity to be heard.

12. That I should be given a procedural requirement of fairness and fair play in this action to defend the case.
13. I make this affidavit in support of my application that the Interlocutory Judgment entered against me be set aside unconditionally and the matter to take its normal cause.
14. That I have a defence on merit in this matter and likely to succeed and the pleadings has not been completed.'

Law on Setting Aside of Interlocutory Judgments

9. Order 19 Rule (3) of the Fiji High Court Rules states –

'Where the plaintiff claim against the 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 the defendant for damages to be assessed and costs and proceed with the action against the other defendants, if any.'

10. In the Supreme Court Practice (1988, vol 1, Sweet and Maxwell Ltd, Fetter Lane, London EC4P 4EE pg 116-117) in para 13/2/1 and 13/2/2 stated –

'13/2/1 Effect of Rule- This rule was taken from RSC (Rev) 1962 O 13 r 2 which had been taken from the former O 13, r 5. The term 'interlocutory judgment' means that such a judgment is interlocutory only as to amount, and is final as to the right of the Plaintiff to recover damages together with such costs as to the amount thereof, when ascertained, entitles him to, having regard to the County Courts Act 1984, ss 19 and ss 20.

The practice based on this assumption, which prevailed prior to the Judicature Acts, is still in force, namely to enter final judgment after assessment as a matter of course for the amount found due, together with costs, subject to the provisions of the County Courts Act 1984, ss 19 and ss 20.'

10. Order 13 Rule (9) of the Fiji High Court Rules provides the laws for setting aside. It provides quite briefly that –

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

11. Supreme Court Practice (1988, vol 1, Sweet and Maxwell Ltd, Fetter Lane, London EC4P 4EE pg 116-117) in para 13/9/1 –

'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 only been obtained by a failure to follow any of the rules of procedure'. (per Lord Aitkin in Evans -v- Bartlam [1937] A.C 480 and (c.f. per Jenkin L.J in Grimshaw -v- Dunbar [1953] 1 Q.B 408, p 416; and Hayman -v- Rowlands [1957] 1 W.L.R 317; [1957] 1 All ER 32.'

12. In page 332-333' in paragraphs 19/2/24 The Supreme White Book stated –

'Entering Judgment after expiration of requisite period – Care must be taken to enter judgment until the time has expired, or the defendant will be entitled to *ex debito justitiae* to have it set aside (Anlaby -v- Praetorius (1888) 20 Q.B.D 764, p. 771).”

13. Hence where a judgment is entered irregularly, the court has no discretion but to set it aside.

Analysis

Application to set aside

15. Under the provisions of the law, the Court may, at its discretion, consider and set aside a default judgment entered irregularly or regularly. To determine whether it was entered regularly or otherwise the Court must consider the manner in which the default judgment was entered.
16. In this instance, the Writ of Summons was served to the Defendant on 25th March 2023.
17. The Defendant was required to file their Acknowledgement of Service within 14 days thereafter. The Defendant filed later on 25th of April 2023, and under Order 12 rule 5 of the Fiji High Court Rules, the Defendant was entitled to serve a Statement of Defence.
18. The Respondent/Plaintiff had filed their Search for Statement of Defence and thereafter their Interlocutory Judgment on the same dates, 2nd of May 2023 which was prior to the lapse of the 14 days' time period for the filing of the Statement of Defence.

19. Thus the Court finds that the Interlocutory Judgment was entered irregularly. The pleadings had not closed when the Plaintiff/Respondent had filed their application for interlocutory judgment.
20. Furthermore, the Applicant/Defendant had also indicated their intention to defend when they acknowledged service, the Respondent/Plaintiff was barred from entering an interlocutory judgment.
21. On this basis alone the Court finds that the pleadings was still open when interlocutory judgment was entered.
22. The defendant will be entitled to *ex debito justitiae* to have the interlocutory judgment set aside.

Stay of execution of judgment pending trial

23. The Applicant/Defendant has sort for stay of the execution of the Interlocutory Judgment pending trial.
24. Order 47 rule (1) of the Fiji High Court rules prescribes that –

“(1) where a judgment is given or an order made for the payment by any person of moneys, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution –

(a) That there are special circumstances which render it inexpedient to enforce the judgment or order; or
(b) That the application is unable for any cause to pay the monies.

Then notwithstanding rule 2, the Court may by order stay the execution of the judgment or order by writ of *Fieri facias* either absolutely or for such period and subject to such conditions as the Court thinks fit.”

25. In Lal -v- Ramanlal Brothers Ltd [1987] FJCA 17; Civil Appeal No 4 of 1987 (13 March 1987) JA and VP stated –

‘The point is a narrow one, indeed Tucker L.J. in Morgan v. Martin (supra) described it, at p. 113, as "perhaps rather academic" but a party who has a claimable credit arising in the same matter which exceeds the debit for which he is sued is entitled to say that he should not have a judgment entered against him until the matter has been tried. Entry of a Court judgment for debt could adversely

affect a business' man's credit - especially in a comparatively small trading community'

26. In this instance the special reasons for inexpedient the enforcement of the Judgment is because the Court finds there are reasonable grounds to set aside the interlocutory judgment.
27. In having it set aside, the parties are at liberty to continue to file their necessary pleadings and seek further directions of the Court.
28. In doing this, the Interlocutory Judgment cannot be executed as it would be a denial of natural justice and in doing so, inexpedient.
29. Therefore the Court will grant the application to stay the execution of the interlocutory judgment indefinitely.

Costs

30. The Applicant/Defendant will be granted costs of \$500.

Orders of the Court:

31. The Court orders as follows:

- (i) *That the Interlocutory Judgment be set aside;*
- (ii) *That the execution of the Interlocutory Judgment be stayed;*
- (iii) *That costs be awarded to the Defendant/Applicant to the sum of \$500.*



A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line.

Senileba LWTT Levaci
Acting Puisne Judge, High Court - Suva
9 October, 2023