

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 234 of 2022

BETWEEN: **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 and having its principal office at 360 Victoria Parade, Suva in Fiji.

PLAINTIFF

AND: **THE ASIAN KITCHEN (FIJI) PTE LIMITED AND/OR ITS AGENTS AND/OR ASSOCIATES** a limited liability Company having its registered office at Lot 13 Tagimoucia Place, Laucala Beach Estate, Nasinu, Fiji Islands.

FIRST DEFENDANT

AND: **IENE PATRICK NG AND/OR HIS AGENTS AND/OR SERVANTS AND/OR ASSOCIATES** of Lot 13 Tagimoucia Place, Laucala Beach Estate, Nasinu, Fiji Islands.

SECOND DEFENDANT

Appearances: **Messrs Lajendra Lawyers for the Plaintiff**
Messrs Vama Law for the First Defendant

Hearing: **Thursday, 7th September 2023**

Ruling: **Friday, 13th October 2023**

RULING

Background

1. On 9 August 2022, the Plaintiff initiated legal proceedings via Writ of Summons accompanied by a Statement of Claim against the first Defendant. As per the Writ, the claim in question was liquidated and duly served to the first Defendant on 19 August 2022 at its registered office. The affidavit of service confirming the aforementioned action was filed on 23 August 2022. The allegation against the first Defendant

pertained to the collection of a debt resulting from a bank loan, for which the aforementioned Defendant had failed to fulfil repayment obligations.

2. Upon being properly served, the first Defendant, in accordance with Order 12 Rule 4(a) of the High Court Rules, was obligated to provide an acknowledgment of service of the Writ within a period of 14 days. The first Defendant failed to adhere to the said guideline. In light of this, the Plaintiff made an application in accordance with Order 13 Rule 1(1) of the High Court Rules, seeking entry of default judgment against the first Defendant. On 23 September 2022, the default judgment after being properly vetted was granted accordingly.
3. Hence the present application by the first Defendant filed on 5 December 2022, requesting the default judgment, which was duly entered in favour of the Plaintiff on 23 September 2022, to be set aside. The affidavit of the second Defendant, Iene Patrick NG, was filed in support of the summons. Subsequently on 10 July 2023 the Plaintiff filed an affidavit in opposition of Ramesh Chand, who serves as the Manager of the Asset Management Department of the Plaintiff bank. On 27 July 2023, an affidavit in reply was submitted by the second Defendant.
4. The matter proceeded to hearing as scheduled. At the hearing both counsels presented their oral arguments. Both the Plaintiff and first Defendant's counsel submitted comprehensive written contributions, which were relied upon during the proceedings. The same were duly considered by the court for purpose of deliberations in this matter.

Law & Principles

5. Order 13 Rule 1(1) of the High Court Rules states that:

"Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time enter final judgment against the defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs and proceed with the action against the other defendants, if any".

6. Furthermore in **Wearsmart Textiles Ltd v. General Machinery Hire Ltd** [1998] FJHC 26; Abu0030u.97s (29 May 1998) the Fiji Court of Appeal

addressed the question of setting aside judgment. The Fiji Court of Appeal in **Wearsmart** stated that 'The general principles upon which a Court should act on an application to set aside a judgment that has been regularly entered, are set out in the White Book, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143. They are as follows:

"Regular judgment – if the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (**Farden v. Richter (1889) 23 Q.B.D. 124**). At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., *ibid.* p.129, approving **Hopton v. Robertson** (1884) W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see **Richardson v. Howell** (1883) 8 T.L.R. 445; and **Watt v. Barnett** (1878) 3 Q.B.D. 183, p.363).

For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.**, *The Saudi Eagle* (1986) 2 Lloyd's Rep. 221, C.A., and note 13/9/14. "Discretionary powers of the Court," below.

On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false (**Vann v. Auford (1986) 83 L.S. Gaz. 1725**; *The Times*, April 23, 1986, C.A.) The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the Court should exercise its direction."

A defendant applying to set aside a default judgment must satisfy the following in order to succeed:

- a. a meritorious defence which has a real prospect of success and carry some degree of conviction. It must have a realistic as opposed to a fanciful prospect of success. A supporting affidavit disclosing the condensing particulars of a meritorious defence is mandatory: **Wearsmart Textile Limited v General Machinery Hire Limited and Anor** Civil Appeal No. ABU 0030/1997.

b. some explanation as to why the default judgment was allowed: **Evans and Bartlam** [1937 2 All ER 646]

(i) some explanation for the delay in making an application to set aside: **Pankanj Bamola & Anor v Moran Ali** Court of Appeal Civil Appeal No. 50/90.

(ii) that the Plaintiff will not be prejudiced that may be caused to the Plaintiff as a consequence of setting aside the default judgment **Shiri Dutt v FNPF** [1988] 34 FLR67.

Analysis

7. There is no dispute that the judgment entered in favour of the Plaintiff on 23 September 2022 was a regular judgment.

8. In light of the established principle in Wearsmart (supra), the Defendant in order to succeed in the application to set aside must establish the following criteria:

- i. *There is a meritorious defence which has a real prospect of success (primary consideration);*
- ii. *Some explanation as to why default judgment was allowed; and*
- iii. *Whether the plaintiff will be prejudiced.*

Meritorious Defence which has a Real Prospect of Success

9. Upon careful examination of the affidavit submitted by the Defendant on 5 December 2022, as well as the subsequent affidavit in reply filed on 27 July 2023, it is evident that no discussion or evaluation of the merits of the defence case has been presented.

10. In the absence of any elucidation on the merits of the defence case, the Court faces a challenge in ascertaining whether the first Defendant possesses a meritorious defence that is likely to succeed against the Plaintiff's claim. The first Defendant is required to provide an explanation of the defence's position in contrast to that of the Plaintiff's case. An affidavit pertaining to the defence case is necessary. However, based on the available information, there appears to be a

lack of explanation on the defence case and its likelihood of being successful against the Plaintiff's claim.

11. Furthermore, I have examined the proposed Statement of Defence. The Statement of Defence is seen to present a blanket denial of the matter mentioned in the Statement of Claim, without specifically addressing the subject of failing or defaulting loan repayment.
12. The first Defendant has alluded to statements regarding the impact of the COVID-19 crisis on the company's financial status. I think the first Defendant was suggesting that it was entitled to a forbearance of the loan terms. Nevertheless, the second Defendant acknowledged in her affidavit at paragraph 10, that the Plaintiff had indeed postponed the loan due until December 2020. Based on an analysis of the proposed Statement of Defence, it is not possible to assert that the first Defendant has a legally sound defence that has real prospect of success.
13. Based solely on this fundamental factor, I conclude that this application should be rejected.

Some Explanation as to why Default Judgment was Allowed

14. The affidavit submitted by the second Defendant mentions that the location from which the first Defendant was conducting operations was vacated in late November 2021. Consequently, the individual in question did not receive personal service of any legal documents, rendering her unable to submit an Acknowledgment of Service, Notice of Intention to Defend, and Statement of Defence.
15. The argument that the first Defendant should have been served personally due to change in address I find as unsatisfactory and untenable. The first Defendant has a legal duty to notify the registrar of companies on any change in their business address. This principle is of essential importance and serves as a crucial protection to ensure that registered companies operate with transparency and accountability. In addition, it is important for the registrar of companies to possess precise and current information for various purposes, one of which is to enable the efficient delivery of legal documents to the company.
16. As I see it, no reasonable or satisfactory explanation was given by the first Defendant regarding this issue. On this ground the application should also be dismissed.

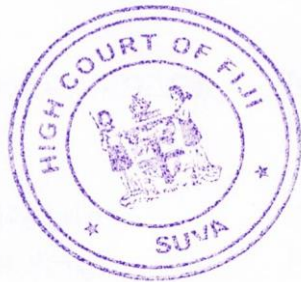
Prejudice to Plaintiff

17. On this final issue, I only wish to add that this matter would only lead to unnecessary litigation and costs if it was to continue, as there are no valid or meritorious defence being established. The first Defendant had taken about three months to institute the present action to set aside a regular default judgment. The Writ of Summons and Statement of Claim was filed in August 2022 and one year has lapsed since its inception.
18. Given the said circumstances, I think it would be unjust to deprive the Plaintiff the fruit of litigation.

Conclusion

Based on the preceding discussions, I order as follows:

- i. The first Defendant's application to set aside the Default Judgment entered on 23 September 2022 is declined and dismissed.
- ii. The first Defendant is ordered to pay the Plaintiff the sum of \$800.00 as summarily assessed costs, to be paid within 21 days from today.



A handwritten signature in black ink, appearing to be "Samuela D Qica".

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Samuela D Qica
Acting Judge

High Court – Suva
Friday, 13th October, 2023