

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 21 of 2022

BETWEEN : **TRI DEES SPARES PTE LIMITED** having its registered office
at Lot 7, Beddoes Circle, Nadi, Vitilevu.

Plaintiff

AND : **VIMAL NITESH ANAND** of Lautoka.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. A. Swamy for the Plaintiff
Ms. S. Begum for the Defendant

Date of Ruling : 15th March 2024

RULING

01. The defendant on 29.03.2022 filed a Motion supported by his affidavit and moved the court for following orders:
- a. AN ORDER that the Default Judgment entered on 11.03. 2022 be wholly set aside;
 - b. AN ORDER that there be stay of execution of default judgment;
 - c. The costs of this action be in the cause; and
 - d. Any other order this court may seem just and equitable.

02. The defendant, by an oral agreement, was appointed as a branch manager at the Labasa Store of the plaintiff company. As agreed by both the plaintiff and the defendant, the defendant was responsible, among other duties, to account for all receipts from the sale of spare parts either by cash transactions or payment received by electric fund transfer at point of sale (**eftpos**). The defendant was also responsible to ensure that, all moneys received were deposited to the account of the plaintiff. The plaintiff alleged that, between August 2019 and April 2021 under the management of the defendant, the plaintiff received sum of \$ 849, 386.14 from the sale; however, only sum of \$ 681,116.62 was deposited to the account of the plaintiff. There was a shortage of \$ 133,859.28 which consists of cash and cheque deposit of \$ 12,250.40 and Eftpos deposit of \$ 121,608.88. The plaintiff alleged that, the defendant breached his duty of care and terms of his employment and thereby caused loss to the plaintiff. The plaintiff sued the defendant to recover the same amount together with the damages and interest.
03. The writ was issued on 26.01.2022 and served on the defendant on 02.02.2022. The defendant acknowledged it and filed, in person, his Notice of Intention to Defend on 11.02.2022. However, the defendant failed to file and serve his Statement of Defence within the time specified by the rules. The plaintiff then sealed the default judgment for the liquidated sum of \$ 133,859.28 on 11.03.2022.
04. It is evident from the record that, the process was duly served on the defendant, before the default judgment was sealed. Accordingly, the default judgment entered on 11.03.2022 is regular. The court has unfettered discretion to vary or set aside any judgment entered on such terms as it thinks just (see: Or. 19 r. 9). Number of cases, both in local and overseas jurisdictions, have laid down the tests applicable when the court exercises its discretion to set aside a default judgment.
05. Fatiaki J (as he then was), having considered several cases in **Fiji National Provident Fund v. Datt** [1988] 34 FLR 67, held at page 69 that:

“The discretion is prescribed in wide terms limited only by the justice of the case and although various "rules" or "tests" have been formulated as prudent considerations in the determination of the justice of a case, none have been or can be elevated to the status of a rule of law or condition precedent to the exercise of the courts unfettered discretion.

These judicially recognised "tests" may be conveniently listed as follows:

- (a) whether the defendant has a substantial ground of defence to the action;
- (b) whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and

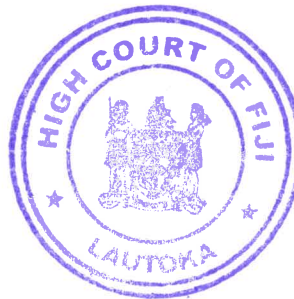
(c) whether the plaintiff will suffer irreparable harm if the judgment is set aside.

In this latter regard in my view it is proper for the court to consider any delay on the defendant's part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and whether or not the same has been stayed”.

06. The defendant vehemently denied the allegation of the plaintiff and stated in his proposed Statement of Defence that, he neither holds any accounting knowledge nor was the sole person in charge of operating accounting system at the plaintiff’s branch in Labasa. The defendant further stated that, the funds in Eftpos could be recovered if proper settlement is done by the plaintiff and actions taken for the cheques that returned with the remarks “Refer to the drawer”. The defendant asserted in his proposed Statement of Defence that, he was never charged by the police for embezzlement even though the alleged amount is substantial and the plaintiff claimed that, he (defendant) obtained financial advantage by deception. The defendant has pleaded damages for mental anguish and stress in his counter claim against the plaintiff.
07. It is evident from the proposed Statement of Defence annexed with the supporting affidavit that, there are number of issues to be determined in this matter. Some of them are: (a) whether defendant was solely appointed to operate the accounting system of the plaintiff, (b) what are the terms and conditions of the oral agreement by which defendant was appointed as the branch manager, (c) was there proper settlement or reconciliation of accounts, (d) whether the amounts in the returned cheques were taken into account when determining the shortage, (e) what are the actions taken to recover the amounts of returned cheques, and (f) why the defendant was not charged by the police for embezzlement? These issues clearly indicate that, the defendant has substantial ground of defence.
08. The defendant applied for legal aid assistance to defend this case and was waiting for the approval to file the Statement of Defence. The Exhibit marked as “VNA1” indicates that, he applied for legal aid on 11.02.2022 – the same day he filed the Acknowledgment. The exhibit corresponds with his assertion. Whilst, the defendant was waiting for the approval for his application for legal aid, the plaintiff entered the default judgment on 11.03.2022. The defendant who filed the acknowledgment on 11.02.2022, should have filed his defence within 14 days on or before 15.02.2022. The actual delay is only 15 days and the defendant was waiting for the approval of the Legal Aid Commission. There is sufficient justification for this delay and it is reasonable. There is nothing to indicate that, the plaintiff will suffer irreparable loss if the impugned default judgment is set aside.

09. Accordingly, the defendant was able to highlight the issues between him and the defendant and thereby satisfied the court that, there is a meritorious defence in this matter. The delay, as stated above, is insignificant and there is proper justification for the same. For these reasons I am of the view that, the cost for this application should be in the cause for the winning party to be entitled to the same.
10. In result, I make following final orders:
- a. The default judgment entered on 11.03.2022 is set aside, and
 - b. The cost in the cause.

At Lautoka
15.03.2024




U.L. Mohamed Azhar
Master of the High Court