

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 292 of 2019

IN THE MATTER of an Appeal from the Decision of the Learned Master Madam Vandhana Lal of the High Court Suva dated 1st Day of August 2023 in Civil Action No. HBC 292 of 2019.

BETWEEN : **SHARMA'S ENTERPRISES LIMITED** of a limited liability company having its registered office at Saweni, Lautoka.

FIRST APPELLANT/ORIGINAL
FIRST DEFENDANT

AND : **HIRDESH SHARMA** of Saweni, Lautoka, Director.

SECOND APPELLANT/ ORIGINAL
SECOND DEFENDANT

AND : **LEO NAIKASAU** trading as **MASADA TRANSPORT**.

RESPONDENT/ ORIGINAL
PLAINTIFF

BEFORE: Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Pal A. for the Plaintiffs
Mr. Prasad R. for the Defendant

DATE OF DECISION: 18th July 2024 @ 9.30 am.

DECISION

[Defendant's seeking for Leave to Appeal the Order of the Master delivered on 1st August 2023]

INTRODUCTION

1. The Defendants [1st and 2nd Appellants] files a Summons on 21st August 2023 and sought for the following orders:
 - (a) Leave to Appeal the order of the Master delivered on 01st August 2023;
2. The order sought is with regards to the **Interlocutory Ruling** seeking for the '**Setting Aside of the Judgment by Default**' entered against the Defendants on 31st August 2019.
3. The Application is made pursuant to Order 59 Rule 8 (2) of the High Court Rules 1988 and relies on the affidavit in support deposited by Hirdesh Sharma.
4. The Plaintiff did not file any affidavits to counter the Defendant's summons.
5. However, both parties to the proceedings furnished Court with their respective written submissions and argued the Defendant's application for leave to appeal orally.

Defendant's [Appellant's] Contention

6. Relied on her written submissions.
7. The Master was plainly wrong on several counts and ought to have set aside the Default Judgment, allowed the Defendants to defend as per their Statement of Defence.
8. The Appeal raises some triable issues.
9. Case precedent referred to:
 - i) **Dass v Dass** [2022] FJHC 478; HBC 101.2016
 - ii) **Singh v Rao** [2010] FJHC 511; HBC 20.2010
10. Traffic offence conviction - charge is not conclusive evidence of negligent driving.
11. Claim in negligence requires formal proof.
12. The Default judgment is irregular and needs to be set aside.
13. Seeking for costs.

Plaintiff's [Respondents] Contention

14. Order 59 Rule 9 (b) refers - Time for Appealing
15. Order 59 rule 11 refers - Application for Leave to Appeal
16. Interlocutory ruling delivered on 01st August 2023, refusing to set aside default judgment.
17. Leave to Appeal to be filed and served within 14 days of the delivering of the Order or judgment.
18. Time expired on 15th August 2023, Absence of enlargement of time.
19. Should be dismissed with costs.

Determination

20. On 01st August, 2023, Learned Master delivered her **Interlocutory Ruling** on Defendant's [Appellants] '**Setting aside of Judgment by Default**' application filed on 07th November 2019.
21. She dismissed the application and any stay granted on execution of the Judgment was also set aside accordingly.
22. The Plaintiff's substantive writ was dated 03rd September 2019 and served onto the Defendants on 10th September 2019 and service was not in dispute.
23. The Defendants have neither filed any 'Acknowledgement' nor 'Statement of Defence' to counter the Plaintiffs Claim.
24. On 25th September 2019, the Plaintiff file a Praecipe, Search for Acknowledgement of Service by the Defendants and sought for 'Judgment by Default' in the sum of FJD\$87,368; costs and Pre-Judgement and Post Judgement interest at the rate of 8% per annum.
25. Subsequently, Notice of Appointment of Solutions was filed by Messrs. Fazilat Shah Legal to Act for the Defendants [Appellants] coupled with a summons and affidavit seeking for 'Setting Aside of Default Judgment order against the Defendants; 'Stay of Execution of the Default Judgment' pending the setting aside application and costs.

26. The Learned Master scheduled the hearing of the Defendant's application on 02nd September 2020 with a further direction for parties to furnish written submission in 21 days.
27. Both parties to the proceedings furnished court with their respective written submissions and whilst the Plaintiff appeared at the Hearing of the application and the Defendants [Appellants] failed to appear at the hearing, the application was heard and concluded for decision to be delivered.
28. On 01st August 2023, only the Plaintiff Counsel appeared and there was no appearance of the Defendants [Appellants] and it's Counsel representing.
29. The Interlocutory Ruling was accordingly delivered.
30. In her Ruling, the Learned Master said:

"9. A perusal of the draft defence either wise, shows bare denial with no arguable defence.

10. Conviction in the Magistrate Court in Tailevu File No. 09 of 2019 is relevant as the Plaintiff intends to rely on this to establish the Second Defendant's liability.

11. I have taken judicial notice of the proceeding at Tailevu Magistrate Court Traffic Case No. 09 of 2019 where the Defendant had pleaded guilty and was convicted for dangerous driving and sentenced thereafter.

12. The Defendant's application filed on 07th November 2019 is hereby dismissed and any stay granted on execution of the judgment is set aside."

31. From the perusal of the Court Record it can be ascertained and is evident that the Defendants [Appellants] did not have any genuine interest in proceedings with either the substantive impending matter and/or the subsequent application seeking for setting aside of the default judgment and stay of execution application.
32. It is noted that the Defendants [Appellants] appeared not to pay any heed to the Court directions to appear at the Hearing to vigorously show to court why the Defendant Judgment entered and sealed against the Defendants ought to be set aside and they be allowed to defend and file the Statement of Defence.
33. The Learned Master quite categorically in her interlocutory ruling stated at paragraph 9 that:
'A perusal of the draft defence either wise, shows bare denial with no arguable defence put forth, the Defendant had pleaded guilty and was convicted for dangerous driving and sentenced in Tailevu Magistrates Court Traffic Case No. 09 of 2019 and hence that this conviction was relevant since the Plaintiff intended to rely on this prima facie evidence (Conviction) to establish the second Defendant's liability.

34. Taking into consideration all above, I hold the interlocutory ruling of the Learned Master dated on 01st August 2023.
35. Accordingly for the rational outlined hereinabove, I have no alternative but proceed to dismiss the Defendant's [Appellants] summons filed on 07th November 2019 seeking for setting aside of default judgment entered against the Defendant's coupled with a stay of execution pending the decision on setting aside application and costs accordingly.

Costs

36. The application proceeded to full hearing. Although the Defendants [Appellants] have furnished Court with written submissions together with the Plaintiff's written submissions and only the Plaintiff was represented at the hearing and the counsel made oral submissions. It is only just and fair that the Defendants [Appellants] pay the Plaintiff a sum of \$2,000 summarily assessed costs to the Plaintiff within 14 days' time frame.

Orders

- i. The Defendants [Appellants] summons filed on 7th November 2019 dismissed in its entirety.
- ii. The Defendants [Appellants] to pay the Plaintiff a sum of \$2,000 as summarily assessed costs to the Plaintiff within 14 days timeframe.

Dated at **Suva** this **18th** day of **July** , **2024**.




VISHWA DATT SHARMA
PUISNE JUDGE

CC: MESSRS. FAZILAT SHAH LEGAL, LAUTOKA
A P LEGAL, SUVA