

**IN THE RESIDENT MAGISTRATE'S COURT**  
**AT SUVA-CIVIL DIVISION**

Civil Action No MBC 27 of 2021

**BETWEEN:** CARPENTERS PROPERTIES PTE LIMITED

**PLAINTIFF**

**AND :** SHALENDRA NARAYAN t/a Prestine Gold

**DEFENDANT**

**For the Plaintiff** : Mr. Kaleem (**PATEL SHARMA LAWYERS**)

**For the Defendants** : Mr. Kumar (**LAW PARMENDRA**)

**Date of Ruling** : 20<sup>th</sup> July 2023

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**Ruling on Setting Aside**

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1. The Defendant via his counsel has filed an application seeking to set aside the orders of this court and stay any execution as a result of a Judgment entered in default of appearance.
2. In the Affidavit filed in support of the Application, it is the Defendant's position that he has never been served with the Writ of Summons and the Claim.
3. This failure has prejudiced him in preparing a defence, which as his Affidavit suggests is meritorious.
4. The Plaintiff vehemently objects to the application on the basis that they had been attempting to serve the Defendant but were unsuccessful.
5. They then with leave of the court were granted service via advertisement in one of the local newspapers as a form of substituted service.

6. On the returnable date for service, neither the Defendant nor his legal representative were present. There also was no notice of intention to defend filed.
7. As a result on the application by the Plaintiff and noting that the claim was for a liquidated sum, the court entered Judgment in Default.

#### **The Law**

8. The Magistrates Court Rules, specifically Order 30 allows for setting aside of a judgment made in absence of a party. Order 30 Rule 5 says;

*"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit."*

9. When deciding an application for setting aside a 'Default Judgment' the first issue to be deliberated on is whether the judgment was entered regularly or irregularly.
10. If the judgment was entered irregularly the Defendant shall have the judgment set aside as of a right, however when it is a regular judgment then the court will have to consider a range of factors.
11. Determining whether a Judgment is regular or irregular begins with a determination, on whether it is a liquidated claim or an unliquidated claim.
12. A liquidated claim as determined in ***Subhodh Kumar Mishra v Car Rentals (Pacific) Ltd (1985) 31 FLR 49*** is a demand for a specific sum of money due and payable and this amount can be ascertained as a mere matter of arithmetic.

13. In contrast an unliquidated claim as determined from **Subodh** (supra) is a claim which requires investigation beyond mere calculation.

14. In this case the Plaintiff's had satisfactorily served the Writ and Claim via substituted service, there was no appearance as well as there being no filing of the notice of intention to defend.

15. The court also noted that the Judgment sum claimed, that is, \$11,723.25 was ascertainable as a matter of mere arithmetic and did not require an investigation beyond mere calculation.

16. As such as per Order 6 Rule 8 of the Magistrates Court Rules a default judgment was entered. The court reproduces the stated section as follows for context:

*"8. In the case of liquidated demands only, where any defendant neglects to deliver and serve the notice of defence prescribed by rule 6 within the time limited by the said rule, and is not let in to defend in accordance with the provisions of rule 7, then and in such case the plaintiff may enter final judgment against that defendant".*

17. It is therefore the courts considered view that the Judgment which was entered in default, was done so regularly.

18. As the judgment is entered regularly the Defendant may still have it set aside, should it be able to overcome the legal hurdles which have now become trite law.

19. The said principles were well enunciated in **Wearsmart Textiles Limited v. General Machinery Hire Limited**; FCA No. 30/97. They are summarised herein below as follows:

(a) Whether there has been a delay in making the application for setting aside.

(b) If there has been a delay, whether the Defendant has given a satisfactory explanation for his failure to appear.

(c) If the judgment is regular then there must be an affidavit highlighting a meritorious defence.

#### **DELAY**

20. Judgment in default was entered on 31<sup>st</sup> May 2022, whilst the order was sealed on 27<sup>th</sup> June 2022. The Affidavit of the Plaintiff's in opposition to the application to set aside has annexed a copy of the sealed order which the Defendant was made aware of on 17<sup>th</sup> November 2022. This application was filed on 8<sup>th</sup> December 2022.

21. The only explanation given for the delay as explained in the Affidavit of the Defendant is the fact that he only became aware of the action when he was served with the order. He then sought his lawyers help in setting it aside.

22. Given the chronology as highlighted under paragraph 20, the reasons for delay are justifiable. As such although there has been a delay in the filing of the application, the reasons are justifiable.

#### **MERITORIOUS DEFENCE**

23. In *Allen v. Taylor* [1992] PQLR 255 it was adjudged that a meritorious defence has no room for a speculative defence, wherein a meritorious defence should in the affidavit in support of the application demonstrate a real likelihood that a defendant will succeed. Otherwise if no real prospect is shown, relief should be refused.

24. The Affidavit filed in support of the application to set aside has mentioned at paragraph 4 that he has a meritorious defence. There is nothing more to what the Defendant has stated, to highlight a meritorious defence.
25. It has been accepted practice in the Fiji jurisdiction, that a meritorious defence would be highlighted by an annexed draft statement of defence in the affidavit filed in support.
26. The Defendant has not done this and as a result the court is unable to make a determination on whether there is a meritorious defence.
27. As a result the only determination which results is the fact that there is no meritorious defence.

### **Conclusion**

28. Although the reasons for the delay are justifiable, the Defendant has not been able to highlight a meritorious defence.
29. As a result the threshold to allow a setting aside has not been met.
30. The application to set aside the Judgment entered on 31<sup>st</sup> May 2023 is dismissed.
31. Consequently the application to stay the execution is also dismissed.
32. Seven (7) days to appeal to the High Court.

  
JEREMIAS N.L SAVOCA  
Resident Magistrate

