

HENRY STAR DORA -v- SIMEON BAURA

HIGH COURT OF SOLOMON ISLANDS.
(KABUI, J.).

Civil Case No.062 of 2004.

Date of Hearing: 28th May 2004.

Date of Ruling: 04th June 2004.

C. Hapa for the Plaintiff.

G. Suri for the Defendant.

RULING

Kabui, J. This is an application to set aside a default judgment signed by the Registrar on 22nd March 2004 against the Defendant for failing to enter appearance. The orders being sought are these-

1. That the judgment entered in this action against the Defendant on the 22nd March 2004 in default of Appearance be set aside.
2. That leave be granted to the Defendant to file his appearance and defence and/or counter-claim within 14 days.
3. Cost be in the cause.

Brief background.

The Plaintiff is the owner of a motor vessel, "MV Endeavour 2." In June, 2002, the parties agreed that the Plaintiff transport on his vessel 102,440 cubic metres of sawn timber belonging to the Defendant from Lata to Honiara. It was also agreed that the Defendant was to pay freight of \$300.00 per cubic metre upon delivery at Honiara. Upon delivery of the timber in Honiara, the Defendant failed to pay when invoiced with the sum of \$29,100.00 despite repeated requests from the Plaintiff. The Plaintiff's claim is for the above sum plus interest and costs. The above sum excludes the sum of \$1,500.00 paid by the Defendant to the Plaintiff for the purchase of fuel.

The Defendant's case.

The Defendant admits in his affidavit evidence that he had been duly served but had forgotten to attend to the Writ and thus failed to enter appearance within 14 days as specified in the Writ. The reasons that caused him to forget about the Writ were personal to him. Attached to his affidavit is his draft defence which he intends to file.

Counsel for the Defendant, Mr. Suri, did argue that the Defendant was not guilty of any delay in coming to Court for relief nor was there any reason to suggest that setting aside the default judgment would cause any prejudice to the Plaintiff. Mr. Suri also argued that there was a defence on the merits in this case.

The Plaintiff's case.

Counsel for the Plaintiff, Mr. Hapa, did, on the other hand, argue that there was nothing irregular about the judgment being sought to be set aside by the Defendant. On that basis, Mr. Hapa urged me to dismiss the Defendant's application.

Decision of the Court.

The claim by the Plaintiff is for a fixed sum of money owing to him from the Defendant. The Defendant does not dispute that he had been out of time and so the default judgment was in order in terms of Order 13, rule 3 of the High Court (Civil Procedure) Rules 1964 "the High Court Rules." So the default judgment is a regular one. The practice is that where nothing is wrong with the default judgment being sought to be set aside, the Defendant must show by affidavit evidence that there is a defence on the merits. (See *Farden and Another v. Richer* (1889) 23 Q. B. D. 124). There are also authorities in this jurisdiction on this point which I do not wish to go into in this case. The draft defence attached to the affidavit filed by the Defendant does not seem to deny the existence of a contract between the parties but rather the amount claimed by the Plaintiff due to part delivery of the agreed quantity of timber to be transported and delivered by the Plaintiff to the Defendant at Honiara. In terms of Order 23, rule 1 of the High Court Rules, claims for debt on liquidated demand for money arising under Order 3, rule 5 of the High Court Rules cannot be denied. Order 3, rule 5 (a) and (b) above are about contracts generally. In that regard, Order 23, rule 3 above despite the restriction in Order 23, rule 1 above, would allow any defence denying the existence of a contract, or delivery or the amount claimed such as in actions for supply of goods etc. Clearly, the Defendant has denied that he is liable to pay the sum claimed by the Plaintiff because of the 2,342 pieces of timber agreed to be delivered by the Plaintiff, only 1,693 pieces had been delivered to the Defendant. The Defendant had also paid the sum of \$1,500.00 to enable the Plaintiff to purchase fuel for his vessel to reach Honiara. That situation appears to be one that entitles the Defendant to raise the defence of set-off in his defence. Bernard C. Cairns in his book Australian Civil Procedure, at page 208 states-

"... A set-off does not operate as denial of the debt. Really it tacitly assumes the existence of the debt, and then alleges that there are reasons why the plaintiff is not entitled to payment..."

This is exactly what the Defendant is saying in this case. His position is supported by his counter-claim in his draft defence. The author continues at page 211-

“... Being a ground of defence, a set-off is pleaded as part of the defence. Accordingly, the set-off must specifically plead the debt or other claim raised as the set-off. This must be done with particularity so that all the facts on which the defendant intends to rely in establishing the set-off are adequately pleaded and the plaintiff is not taken by surprise...”

A set-off is a defence which stops the plaintiff from enforcing his or her claim in full or in part unlike a counter-claim which is an action in itself separate from any defence. The counter-claim in the Defendant's draft defence is really a set-off which constitutes a defence. There is therefore a defence on the merits in this case. I will therefore set aside the default judgment to allow the Defendant to put his case fairly at trial. The application is therefore granted. There will be no order as to costs. The orders of this Court are-

1. The application is granted and the default judgment is set aside.
2. Leave is granted for the Defendant to enter appearance and file his defence and any counter-claim within 14 days.
3. No order as to costs.

F.O. Kabui
Puisne Judge