

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 386 of 2015

**BETWEEN** : **FORESIGHT CONSTRUCTION LIMITED** **PLAINTIFF**

**AND** : **CHINA RAILWAY FIRST GROUP (FIJI) CO. LTD.**  
**DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF** : Mr. O'Driscoll [O'Driscoll & Company]  
**DEFENDANT** : Mr. Nandan [Messrs Neel Shivam Lawyers]  
**RULING OF** : Acting Master Ms Vandhana Lal  
**DELIVERED ON** : 7th February 2019

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**INTERLOCUTORY RULING**  
[Setting Aside Judgment by Default]

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**Application**

1. This is the Defendant's summon to set aside default judgment entered against it on 11 March 2016.  
  
Said summon was filed on 4 July 2017 and is made pursuant to Order 19 rule 9 of the High Court Rules.
2. The Plaintiff who is opposing the application have filed their Affidavit in Opposition on 18 October 2017.

**How The Default Judgement Was Entered**

3. The Plaintiff on 22 December 2015 initiated proceedings against the Defendant claiming a sum of \$274,057.75 for outstanding rental fees for equipment's.
4. An Affidavit of Service by the Plaintiff was not filed until 2 March 2016.

As per the Affidavit of Service the Defendant was served with the Writ of Summon on 6 January 2016.

5. An Acknowledgment of Service was filed by the Defendant on 11 January 2016.
6. On 2 March 2016 the Plaintiff filed a search for Statement of Defence with praecipe and a Judgment by default for sum of \$274, 057.75.
7. A Judgment by Default was sealed on 11 March 2016.
8. Said Judgment by Default was served on the Defendant on 16 March 2016 and an Affidavit of Service was filed on 31 March 2016.

**Grounds For Making The Application For Setting Aside**

9. One Yang Zhiming the Chief Executive Officer of the Defendant Company deposed Affidavit in Support of the application.

According to him, their Solicitor Ms. Perllace Antonio had on 15 July 2016 received a winding up notice dated 13 July 2016 from the Plaintiff.

Ms Antonio failed to respond to the winding up notice as a result of which an application for winding up was presented to Court on 25 May 2017.

Upon enquiring, Mr Zhiming found out that the winding up notice related to a court action instituted by the Plaintiff where a Default Judgment in the sum of \$274,057.75 was entered.

One Samisoni Wasasala had received the Writ of Summon on behalf of the Defendant.

Up until the winding up notice was issued, none of the other Officers or management were aware of the said legal proceedings.

Prior to the filing of proceedings by Plaintiff, the Defendant had exchanged several correspondences with Plaintiff's solicitors in response to the demand Notice issued.

The Defendant had denied liability for the sum claimed.

According to Mr. Zhiming if the company was made aware of the proceeding by Ms Antonio they would have defended the proceedings.

The Defendant has a good defence on merits:

- *The Defendant strongly disputes that it owes the Plaintiff a sum of \$274,057.75.*
- *On or about February 2012, the Plaintiff entered into a labour contract with the Defendant pursuant to which the Plaintiff was*

*engaged to provide qualified local workers, managing and organising the local workers and to lease out its construction equipment to the Defendant.*

- *The Defendant and Plaintiff had at no point in time confirmed the number, price for use of these equipments and the materials that were transferred to the construction site by the Plaintiff.*
- *The Defendant claims the Plaintiff has failed to give details or particulars of fulfilment of obligation by the Plaintiff as per the terms of hire.*

There are serious trouble issues which ought to be fairly determined at trial.

The Defendant is a substantial company operating in Fiji and currently is engaged in numerous construction projects for the Court of Fiji.

The company is threatened by the winding up proceedings having serious re-percussions for the company.

**10.** In reply the Plaintiff filed an Affidavit of Liu Feng a Company Director.

According to him, the Defendant has taken more than a year to react to the notice and had never sought to set aside the Statutory Demand.

The Writ of Summon was served on 6 January 2016 at the Defendant's Office which was received by the Defendant's agent and/or employee.

The Defendant has repeatedly displayed an unreasonable lack of diligence in attending to this matter.

The Plaintiff on 11 January 2016 had filed an Acknowledgment of Service but took no further action.

The Plaintiff should not suffer the prejudice of delayed justice due to the repeated faults of the Defendant.

The defence is a mere denial without pleading alternate facts and there are not sufficient evidence against the Plaintiff's Claim in order to support any matters pleaded in the Statement of Defence.

The Defendant via their correspondence dated 11 September 2014 had denied forming any contract with the Plaintiff.

The Plaintiff had served the Judgment and has now continued on to advanced stages of enforcement proceeding through winding up.

11. In response Mr. Zhiming stated as follows:

- *Mr. Antonio did not inform the management of the statutory notice received as a result no steps were taken in response to the notice.*
- *The Writ of Summons was received by their Human Resources Officer Ms. Samisoni Wasasala who had forwarded the writ to the Legal Counsel Perllace Antonio. The Company relied on Ms. Antonio to take steps to protect the company.*
- *The Plaintiff has not proffered absolutely any evidence that the Defendant had ordered supply of construction equipment. There are no local purchase orders. There is no evidence to show the various constructions equipment was supplied and used by the Defendant at the project side.*
- *No progress claim or invoice was submitted to Defendant for the supply of the construction equipment.*
- *Neither is there evidence to prove the agreed price, quantity, specification of the equipment to be supplied.*

#### **Determination**

12. Order 19 rule 2 of the High Court Rules allows a Plaintiff to enter final judgment for liquidated demand if the Defendant fails to serve a defence on the Plaintiff.

The Defendant had failed to serve a defence within the prescribed period under the rules.

The Judgment so entered by the Plaintiff is a regular Judgment.

13. Pursuant to Order 19 rule 9 *"the court may on such terms, as it thinks just, set aside or vary any judgments entered in pursuance of the order"*.

14. Pathik J. in **Chandra v. Rokoqica a Suva Civil High Court Action No. HBC 45 of 2000 (B)** held that in cases of a regular judgment and in application for setting aside *"there must be an affidavit of merit, i.e. an affidavit stating facts showing a defence on the merits."*

His Lordship further went on to cite passage from the Supreme Court Practice 1993, Order 13 rule 9 on page 137 to 138:

*"the major consideration is where the Defendant has disclosed a defence on the merits, and this transcends any reason given by him on the delay in making the application even if the explanation given by him is false [Vann -v- Awford (1968) 83, L.S. Claz. 1725, The Times April 23 1986 C.A.]*

15. The Deputy High Court Judge Kwok SC in **Universal Bank v Deep Sea Seafood Trading Limited** [2015] HKCFI 2279; HCA 1213 of 2015 (17 December 2015) held that:

*On an application to set aside a regular default judgment, the major consideration is whether the defendant has shown a defence on the merits to which the court should pay heed, not as a rule of law, but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication, Hong Kong Civil Procedure, 2016, para 13/9/13. It is not sufficient to show a merely "arguable" defence that would justify leave to defend under order 14. The defendant must show that he has "a real prospect of success". To do so, he must satisfy the court that his case and the evidence that he adduces in support of it is potentially credible and carries some degree of conviction, Hong Kong Civil Procedure, 2016, para 13/9/14.*

16. Locally the Court of Appeal in the case of **Fiji Sugar Corporation Limited v Mohammed Ismail** [1988] FLR 12, relied on Lord Atkin in House of Lords whilst laying out the principle on which Courts act whilst dealing with an application to set aside a judgment.

*"Lord Atkin in the House of Lords case Evans v. Bartlam (1937) 2 All ER p. 646 at p.650 said:-*

*"I agree that both R.S.C. Ord. 13, r.10, and R.S.C., Ord. 27, r. 15; gives a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the application must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to*

*revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."*

17. The Defendant has in its Affidavits denies owing the sum claimed by the Plaintiff.

It stated that at no point in time did the parties confirm the number, price for use of the equipment and materials that were transferred to the construction site. There is no local purchase order or evidence to show the construction equipment so alleged to have been supplied and used by the Defendant. There is no progress claim or invoice submitted.

18. There has been substantial delay in making the application for setting aside. The Defendant was served with the Default Judgment order on 16 March 2016 and application for setting aside was not made until July 2017 [one year and four months].
19. The Defendant has given its reason for delay.
20. The Plaintiff has proceeded with enforcement of the Judgment so entered by making an application for winding up.
21. The Defendant can be punished with cost for the delay in making the application and considering the fact the Plaintiff has moved on to execute the Judgment.
22. In order to avoid injustice, I find the Defendant should be heard at trial on their defence.

#### Orders

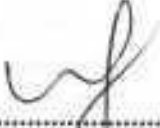
23. Accordingly I make following orders:

- i. The Default Judgment so sealed on 11 March 2016 is set aside on conditions that:*
- a. the Defendant deposits into the Court trust account sum of \$274,057.75 in 14 days; and*
  - b. the Defendant also files and serves its Statement of Defence in 14 days.*

Unless the above conditions are met within 14 days [by 4pm on 21 February 2019] from delivery of this Judgment, the Default Judgment so entered on 11 March 2016 shall stand.

24. The Defendant is further ordered to pay cost to the Plaintiff summarily assessed at \$2,000 said sum is to be paid in 14 days.



  
 Vandhana Lal [Ms]  
 Acting Master  
 At Suva.