

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 006 of 2009

Between: **CORAL SUN LIMITED** a limited liability company
 having its registered office at GH Whiteside & Co, Suva
Plaintiff

And **:** **AUBREY WHIPPY** of Nadi, Director
Defendant

Before **:** Master Anare Tuilevuka

Counsels **:** **Munro Leys for the Plaintiff**

: **Leweniqila Esquire for the Defendant**

Date of Hearing: **28th October 2009**

Date of Decision: **13th November 2009**

DECISION

INTRODUCTION

1. By Summons dated 16th day of March 2009, the Defendant files an application seeking that Default Judgement dated 18th day of February 2009 entered against the Defendant be set aside and costs of and incidental to this application be costs in the cause.
2. The Affidavit of Aubrey Whippy sworn on 10th March 2009 is filed herein support of the application.

3. The Plaintiff has not filed any Affidavit in opposition. However, Counsel for the Plaintiff, Mr. Tomasi Tuitoga, referred to the Affidavit of Bruce Moonie filed on 16th January 2009 and to Whippy's Affidavit filed on 5th February 2009.

CHRONOLOGY

4. On the date of hearing, Mr. Tuitoga filed in Court the Plaintiff's submissions setting out the chronology of this matter which I set out below.

No.	Date filed	Particulars
1.	16 January 2009	Writ of Summons
2.	16 January 2009	Ex-Parte Summons
3.	16 January 2009	Affidavit of Bruce Moonie in Support of Ex-Parte Summons
4.	21 January 2009	Summons
5.	28 January 2009	Defendant's Acknowledgement of Service of Writ of Summons
6.	5 February 2009	Aubrey Whippy's Affidavit in Response
7.	19 February 2009	Search for Defence
8.	19 February 2009	Default Judgment (dated and entered on 18 February 2009)
9.	20 February 2009	Statement of Defence (filed out of time – see Order of 10 March 2009)
10.	11 March 2009	Summons to Set Aside Default Judgment
11.	11 March 2009	Affidavit in Support of Summons to Set Aside Default Judgment
12.	16 March 2009	Order of 10 March 2009
13.	29 June 2009	Notice of Change of Solicitors

5. Whippy's Affidavit also sets out his version of the chronology of events in Court proceedings between 19th January 2009 to 20th February 2009. He deposes in paragraph 7 that on 13th February 2009, the matter was called before His Lordship (referring to Datt J) who encouraged parties to discuss settlement and then directed that no further documents were to be filed and the matter to be recalled on 17 April 2009.
6. The Court minutes for that day show no record of such. It records instead that "*the Plaintiff had sought 21 days to reply to the Defendant's Affidavit*" and the matter as being adjourned to 17th April 2009 for mention "*to check compliance*".
7. The Plaintiff's claim alleges that on 26th April 2000, the Plaintiff and the Defendant entered into **an "employee non-disclosure agreement"**. By clause 2 of the said Agreement, Whippy undertook as follows:

"I agree that I shall not during , or at any time after the termination of my employment with the Company, use for myself or others, or disclose or divulge to others including future employers, any trade secrets, confidential information, or any other proprietary data of the Company in violation of this agreement"
8. Moonie's Affidavit deposes that Whippy, shortly before he resigned from the Plaintiff company, used the Plaintiff company data and system "*asking clients (of Coral Sun) to leave Coral Sun after booking ..and forwarding a copy of the e-mails to his new company..*"

THE LAW APPLICABLE

9. Mr. Tuitoga has canvassed the principles of setting aside a default judgment quite well in his written submissions.
10. A defendant applying to set aside a default judgment must satisfy the following in order to succeed:
 - a. *a meritorious defence which has a real prospect of success and carry some degree of conviction. It must have a realistic as opposed to a fanciful prospect of success. A supporting affidavit disclosing the condescending particulars of a meritorious defence is mandatory: **Wearsmart Textile Limited v General Machinery Hire Limited and Anor** Civil Appeal No. ABU 0030/1997.*
 - b. *some explanation as to why the default judgment was allowed: **Evans and Bartlam** [1937 2 All ER 646.*
 - (i) *some explanation for the delay in making an application to set aside: **Pankanj Bamola & Anor v Moran Ali** Court of Appeal Civil Appeal No. 50/90.*
 - (ii) *that the Plaintiff will not be prejudiced that may be caused to the Plaintiff as a consequence of setting aside the default judgment **Shiri Dutt v FNPF** (1988) 34 FLR67.*

(see also **Gulf Seafood (Fiji) Limited v Native Land Trust Board** - Civil Action No. HBC 472 of 2007 at pages 4 and 5)
11. The principles are explained in **Wearsmart Textiles Limited v General Machinery Hire Limited (1998) FJCA 26; ABU0030 of 1997 (Unreported)**, where the Fiji Court of Appeal said:

‘The general principles upon which a Court should act on an application to set aside a judgment that has been regularly entered, are set out in the White Book, i.e. The

Supreme Court Practice 1997 (Volume 1) at p.143.
They are as follows:

*“Regular judgment – if the judgment is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (**Farden v. Richter (1889) 23 Q.B.D. 124**. At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason,” per Huddleston, B., *ibid.* p.129, approving **Hopton v. Robertson** (1884) W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see **Richardson v. Howell** (1883) 8 T.L.R. 445; and **Watt v. Barnett** (1878) 3 Q.B.D. 183, p.363).*

*For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.**, *The Saudi Eagle* (1986) 2 Lloyd’s Rep. 221, C.A., and note 13/9/14. “Discretionary powers of the Court,” below.*

*On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false (**Vann v. Auford (1986) 83 L.S. Gaz. 1725**; *The Times*, April 23, 1986, C.A.) The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the Court should exercise its direction.”*

SUBMISSIONS

12. Mr. Leweniqila referred to the Affidavit of Whippy and the proposed Defence attached therein. He submits that the proposed defence discloses a defence on the merits. He points out that the same defence had been duly filed and issued by the Registry of this Court.

13. Mr. Tuitoga submitted that that defence had been the subject of discussion before Master Udit on 10th March 2009 who, having noted that the defence had been filed out of time without leave, and there being no appearance by the Defendant nor his counsel, had ordered the Plaintiff's counsel to execute judgement to be dated and entered on 18th February, 2009.
14. Mr. Leweniqila responded that the same defence is now attached to their Affidavit which they propose to file if their application is allowed. He emphasises after referring to the relevant law applicable that the defence has merits.
15. Mr. Leweniqila further submitted that their defence was only filed 2 days out of time. He submitted that the history of proceedings will show that the Plaintiff had been aware all along right at the outset that his client would defend the matter. He said the matter had started out as an injunction application and the substantive affidavits filed by his client showed that he would be adamant about defending even the claim.
16. Mr. Tuitoga submitted that the defence was due on 16th February 2009 and was in fact filed 4 days (not 2 days) out of time. He submits further that the law on setting aside requires an affidavit of merits. In other words, it must state facts and merely attaching a proposed defence is not enough. He argues that even the proposed defence annexed to the Affidavit has no real prospect of success.
17. Mr. Tuitoga further submitted that his client is prejudiced as he had spent money executing the judgement through Bankruptcy proceedings. However, when pressed, he could not recall the Bankruptcy number (I note that no sum is yet entered on the judgement and there is yet no assessment yet done on damages

and wonder how a Bankruptcy action could proceed from such). In any event, no Affidavit has been filed to substantiate this allegation of prejudice.

18. In the alternative, Mr. Tuitoga submitted that if the Court is minded to set aside default judgement, then the Court should set the following conditions on the defendant:
 - (i) to pay the Plaintiff's costs at \$1,500 -00 (one thousand and five hundred dollars)
 - (ii) that the defendant deposits \$150,000-00 (25% of default judgement) into Court within 21 days.
19. Mr. Leweniqila in reply submitted that the proposed defence annexed to the Affidavit has merits. He submitted that his client is a small operator and the imposition of condition (ii) above would stifle him and put undue restraint on his trade. Surely, he submits, this Court should not as a matter of law and policy, accede to requests which in effect would be a restraint of trade and stifle competition.
20. I note that paragraph 6 of the propose defence pleads a denial that the information accessed by Whippy wholly belonged to the Plaintiff and also in paragraph 8, pleads that the contract in question had been discharged by performance.

CONCLUSION

21. The writ and claim together with an ex-parte Summons were filed on 16th January 2009. On 28th January 2009, the defendant filed their Acknowledgement of Service and on 5th February 2009, they filed their Affidavit in response to the Summons. On 21st January 2009, the Plaintiff filed another Summons returnable on 13th February 2009. An on 19th February 2009, Default Judgement was entered. The Defendant filed a Defence on 20th February 2009 which was sealed and issued but is now to be disregarded in light of the Orders of Master Udit as referred to above. By 6th March 2009, the Defendant had already filed their Summons to Set Aside Default Judgement.
22. The only issue to consider is whether there is a defence on the merits.
23. Whippy's proposed defence appear to raise some triable legal issues. This may or may not in turn raise issues of competition law in Fiji and the extent to which the Agreement purportedly signed by the parties will be caught by it. Already, whippy is denying that not all of the information belongs to the Plaintiff.
24. In my view, it would be unreasonable to expect the Court to resolve the issues at this interlocutory stage on the affidavits filed. The court must only be satisfied that the defence is bona fide and has a real prospect of success and carry some degree of conviction.
25. I find that the proposed defence is bona fide and carry some degree of conviction.

26. The default judgment entered against the Defendant is hereby set aside with \$300-00 costs to the plaintiff, which is to be paid by the **04th December 2009**. The defendant is to file and serve the statement of defence also by the **04th December 2009** . Accordingly, so ordered.

Adjourned to **05th December 2009** for mention.

A. Tuilevuka

Master