

**IN THE FULL COURT OF THE HIGH COURT  
OF THE SUPREME COURT OF JUDICATURE**

**CIVIL JURISDICTION**

**2022-HC-DEM-CIV-FCA-24**

**BETWEEN**

**LESLIE RAMSAMMY**

**Appellant**

**-AND-**

**ENRICO WOOLFORD**

**Respondent**

**Before**

**Hon. Madam Justice Priya Sewnarine-Beharry**

**Hon. Mr. Justice Gino Peter Persaud**

**Appearances**

**Mr. Nirvan Singh for the Appellant**

**Mr. Eusi Anderson for the Respondent**

**JUDGMENT DELIVERED: 24<sup>th</sup> November, 2022 (via electronic  
mail)**

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**PERSAUD, J:**

1. This is an appeal by the first defendant from a decision of the trial judge's refusal to set aside a default judgment in a defamation case. The following is the procedural history:
  1. 11 March, 2021 - 2<sup>nd</sup> and 3<sup>rd</sup> defendants were personally served and subsequently filed a defence.
  2. 25 August 2021 - Default judgment entered against the first defendant after publication in the newspaper following an order for substituted service.
  3. 13 October, 2021 – application filed by first defendant to set aside default judgment.
  4. 11 March, 2022 – dismissal of first defendant's application to set aside the default judgment
  
2. There are three defendants. The second and third defendants filed their defence and are in order. The first defendant/Appellant herein had a default judgment entered against him for failing to file a defence. The proceedings were never personally served on the Appellant but an application was successfully made for substituted service by way of newspaper publication. It was following the newspaper publication that an application was made for judgment in default of defence which was granted. This was subsequently brought to the attention of the Appellant who filed an application to set aside the default judgment which was refused. This appeal is from that refusal.

3. The trial judge found that the appellant did not provide a reasonable explanation for his failure to file a defence and held that the Applicant must not only attach a draft defence but must also file an affidavit setting out the evidence being relied upon which must include sufficient particulars to satisfy the court of a meritorious defence. This is also referred to as an Affidavit of Merit. The obligation to show that a defence has a real prospect of success is not satisfied by merely exhibiting a draft defence. The trial judge found that the appellant failed to provide evidence to show he had a defence with a real prospect of success.
4. I agree with the learned trial judge's view that the appellant did not provide a reasonable explanation for his failure to file a defence.
5. However, I am of the view that there are limited exceptions to the requirement to file an affidavit of merit. This was recognized by *Kodilinye on Civil Practice and Procedure* who stated at page 58 (3<sup>rd</sup> ed) that *the practice of providing an Affidavit of Merit would be departed from only in rare cases.*
6. I am of the considered view that one such limited exception exists in defamation proceedings. An important object if not a crucial factor for consideration in defamation matters is damage to reputation and vindication of reputation. This can be easily undermined if a default judgment in a defamation claim is allowed to stand. It will be said that there was or might have been evidence available to support the defence/s pleaded but the Court

refused to admit it without addressing the merits of the defence. The appellant has pleaded in his draft defence that his statements were true and fair comment *inter alia*. It is thus in the interests of both sides that the defences pleaded should be properly addressed. See *Berezovsky v Russian Television* (2009) EWHC 1733.

7. In *Berezovsky v Russian Television and Radio* [2009] EWHC 1733, [18], *Eady J* held that in a defamation claim involving serious allegations it was in the interests of both sides that a proposed plea of justification should be properly addressed. That is because the primary object of most libel actions is to achieve vindication of reputation, and if a claimant obtained relief purely on judgment obtained in default, it would be easy for those ill-disposed towards him to undermine the effectiveness of that vindication.
8. Another important consideration in the instant case is that the second and third defendants are defending the claim having complied with the requirement to file a defence. It would in my mind be illogical to proceed to a trial with additional defendants defending the claim while a default judgment stands against the first defendant/appellant. What happens if the additional defendants are able to successfully defend the defamation claim? This could ultimately lead to an inconsistent outcome which would not be in anyone's interests, least of all the interests of justice.

9. In the case of *Fox v Wiggins (2019) EWCH 2713* the Court set aside a default judgment in a defamation claim recognizing the unique nature of defamation proceedings and the fact that it would have been inappropriate in those circumstances to allow the default judgment to stand. In this case, the claimant argued that the sixth defendant failed to establish that she had a real prospect of successfully defending the claim and that she failed to adduce any evidence to apply this test, let alone to satisfy it. She also failed to serve even a draft defence. The Court set aside the default judgment and observed that the sixth defendant did not act promptly in seeking to have the judgment against her set aside. The order in question was made on 4 May 2018 and it provided that judgment in default would take effect on 5 June 2018 unless the necessary evidence was served. The application to set aside the default judgment was not made for many months after that.

10. The Court accepted the Claimant's argument that it could not on the material before it, conclude that the Sixth Defendant had a real prospect of successfully defending the claim since neither the Sixth Defendant nor her mother adduced any evidence as to the truth of the allegations despite having had a significant period of time to address them. The Court noted that no draft defence had been served as at the date of the hearing even though the sixth defendant had had a litigation friend and legal assistance for a significant period of time before then.

11. However, notwithstanding the failure to apply promptly to set aside the default judgement and having also failed to satisfy the

Court that the defendant had a reasonable prospect of successfully defending the claim and having further failed to file a draft defence the Court nonetheless exercised its discretion to set aside the default judgment because it was a defamation case. The Court stated as follows at para 89:

*The notes to this [CPR] rule in the White Book Vol 1 make clear that the discretionary power to set aside is unconditional. Its purpose is to avoid injustice. The major consideration on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other good reason why they should be allowed to defend the claim. The Court's discretionary power is to be exercised to further the overriding objective, not to punish a party for incompetence: Hussain v Birmingham City Council [2005] EWCA Civ 1570, [39]. That said, however, the power to set aside is not to be exercised lightly. That is because its effect is to deprive the claimant of a regular judgment which s/he has validly obtained.*

12. In setting aside the default judgment the Court went on to say that the sixth defendant had established a good reason why the judgment in default should be set aside and stated as follows:

*First, this is a defamation and harassment claim. In Berezhovsky v Russian Television and Radio [2009] EWHC 1733, [18], Eady J held in respect of CPR13.3(1)(b) that in a defamation claim involving serious allegations it was in the interests of both sides that a proposed plea of justification should be properly addressed. That is because*

*the primary object of most libel actions is to achieve vindication of reputation, and if a claimant obtained relief purely on judgment obtained in default, it would be easy for those ill-disposed towards him to undermine the effectiveness of that vindication.*

*Although, for the reasons that I have given, I cannot find on the material before me that the Sixth Defendant has a realistic prospect of defending the claim, I can ascertain that her defence will include a plea of truth under [s 2](#) of the DA 2013. Eady J's principle is therefore engaged. I consider that allegations of such seriousness as are involved in this case cannot be allowed to go by default.*

*To my mind it would obviously be unsatisfactory if the other Defendants were to successfully defend the claim, whilst the judgment in default against the Sixth Defendant should remain. That would be an inconsistent outcome which would not be in anyone's interests, least of all the interests of justice.*

13. There is also a public interest dimension raised in the appellant's draft defence. The appellant has contended at paragraph 16 of his draft defence that the words complained of were an expression of his honestly held opinion and were fair comment upon a matter of public interest, *viz.* the controversial 2020 national elections. Matters of public interest should be investigated at trial. The learned author of *Zuckerman on Civil Procedure: Principles of Practice (4th Edition, Sweet & Maxwell 2020)* noted that such

claims should not be subject to default judgments and stated as follows at para. 9.37

*There may also be situations where the claim raises an issue of general public interest and importance which the court considers deserves a hearing.*

14. Finally, I have also taken into consideration the overriding objective of dealing with cases justly under the CPR and in light of the authorities and analysis above it would be in the interests of justice to allow the appellant to file his defence and defend the claim for defamation. Civil procedure is a handmaiden of justice not its master.

#### **DISPOSITION**

15. In the circumstances, the appeal is allowed and the Appellant is ordered to file his defence by 9<sup>th</sup> December and the matter is remitted to the learned trial judge for case management. Each party shall bear their own costs.

#### **SEWNARINE-BEHARRY J:**

I concur.