IN THE COURT OF APPEAL, FIJ
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 040 OF 2021
[Lautoka Civil Action: HBC 177 of 2016 and HBC 182 of 2018]

BETWEEN	:	**PACIFIC ISLANDS AIR PTE LIMITED**
		1st Appellant
		JOHN SCOTT CURRIE
		2nd Appellant
AND	:	**LARRY SIMON**
		Respondent

Coram	:	**Jitoko, P**
	:	**Jameel, JA**
	:	**Clark, JA**
Counsel	:	**Mr. J. Apted for the Appellants**
	:	**Mr. I. Fa (Snr.) for the Respondent**
Date of Hearing	:	**14 February 2024**
Date of Judgment	:	**29 February 2024**

JUDGMENT

Jitoko, P

[1] I agree with the reasons and conclusions of Jameel, JA.

Jameel, JA

Introduction

[2] This is a consolidated appeal against two separate, but similar interlocutory judgments of the High Court delivered on 22 January 2020, dismissing the Summons filed by the Appellants to set aside the Default Judgements entered due to "*a second consecutive non-appearance"* by the Appellants. When the court entered Default Judgment, it also struck out the Amended Statements of Defence and Counterclaims of the Appellants.

[3] The Respondent instituted two actions against the Appellants. They are:

(i) Civil Action No.177 of 2016 ("***the 2016 action***"):- filed on 24 August 2016 for Judgment in a sum of USD $134,033.00 for breach of contract entered into between the Respondent and the Appellants under an Agreement dated 28 December 2012; and

(ii) Civil Action HBC 182 of 2018 ("***the 2018 action***"):- filed on 17 August 2018, for Judgment in a sum of USD $600,000.00, as the balance sum due under the terms of the said Agreement.

Background

HBC 177 of 2016

[4] Although both Appellants were named as Defendants in the 2016 action, the Respondent sought relief only against the 1st Appellant for judgment in a sum of USD $134,033.00, and interest on the said sum at 12% from 1 May 2013 for breach of the Agreement dated 28 December 2012. In this action, the Appellants sought particulars of the claim, but these were not provided by the Respondent, the Appellants did not file

Statements of Defence, and on 22 November 2016, Default Judgment was entered. This Judgment was later set aside, the Appellants filed Statements of Defence and Counterclaims, the Respondent took necessary steps, and it was ready for trial, at the time the impugned Default Judgment was entered against the Appellants.

HBC 182 of 2018

[5] In this action the Respondent sought Judgment in a sum of USD $600,000.00 (against both Appellants as the balance owing to the Respondent under the said Agreement), damages for breach of the said Agreement, and interest at the rate of 8% per annum compounded on the sum of USD$600,000.00, costs, indemnity costs, and damages for breach of contract. In this case too, the Appellants had filed Statements of Defence and Counterclaims. However, in this action, the Respondent had not issued Summons for directions, no discovery had taken place, and it was not ready for trial at the time the impugned Default Judgment was entered against the Appellants.

The Proceedings of 12 June 2020: Delivery of the Ruling- the dismissal of the application for Summary Judgment in HBC 182 of 2018

[6] On 27 November 2018, the Respondent issued Summons for Summary Judgment. Having heard Counsel and considered the Written Submissions tendered by parties, the learned High Court Judge dismissed this application on 12 June 2020.

[7] In dismissing the application, the court found that the Respondent had failed to discharge the burden of proof that the defence is devoid of any possibility of success, and also found that the Appellants had raised several significant defences which warrant a trial and stated that the court would make order for a speedy trial.

[8] When the court delivered its Ruling on 12 June 2020 dismissing the application for Summary Judgment, all parties were represented by Counsel. The transcript of the

Judge's Notes reveals that when the learned Judge delivered his Ruling dismissing the Respondent's Summons to enter Summary Judgment, he fixed the case to be Mentioned on 19 June 2020, to set a date for trial. The transcript of the Judge's Notes states as follows:

> *Ms. Nettles V (on instructions) for the Plaintiff*
> *Mr. Patel K (on instructions) for the 1st and 2nd defendants.*
> ***Order:***
> *Ruling pronounced.*
> *Mention on 19/06/2020 to set a date for Trial.*

[9] This court was not given a written record of any order having been made in respect of the 2016 action, when the Ruling was delivered on 12 June 2018 in the 2018 action. However, at the hearing of this appeal, Mr. Apted reiterated what was contained in paragraph 23 of the Appellants' Written Submissions - that when the Ruling was delivered in the 2018 action on 12 June 2020, the learned High Court Judge gave verbal directions that both, the 2016 and the 2018 action be Mentioned on 19 June 2020, to set a date for trial.

Proceedings of 19 June 2020

[10] When the case was Mentioned on 19 June 2020, only the Respondent's Counsel was present. There was no appearance for the Appellants, and this was noted by court. However, the court did not give directions to either the Registrar or the Respondent's Solicitors to inform the Appellants of the next date, but proceeded to fix the case to be Mentioned on 26 June 2020. There was no unless order made by court, nor did the court give any other specific directions to the Appellants to appear on the next date, 26 June 2020.

Striking out of Defence and Counterclaim & entering of Default Judgment

Proceedings of 26 June 2020

[11] When the case was Mentioned on 26 June 2020, again, and understandably, there was no appearance for the Appellants. The transcript of the Judge's Notes states as follows:

> *Second consecutive non- appearance by the defendants.*
> *The Statements of Defence and the Counterclaim is struck out.*
> *Proceedings concluded.*
> *The Plaintiff to enter Default Judgment under Order 19 r.3 for his liquidated claim.*

[12] On 9 July 2020, the Respondent filed and sealed the Default Judgments in both actions and on 17 July 2020, served them on Cromptons, the Appellants' Solicitors.

The Appellants' application to set aside the Default Judgments

[13] On 28 July 2020 Cromptons moved promptly to set aside the Default Judgments. They filed the Affidavit of Caroll Sela, a Solicitor employed at Cromptons, who deposed in her Affidavit that: on 12 June 2020 Krishnil Patel Lawyers appeared as Lautoka agent for Cromptons in the 2018 action, when court dismissed the Respondent's application for Summary Judgment on the last page of the Decision, the learned Judge had stated "*I will make order for a speedy trial*", but this action was not adjourned to a specific date, the Respondent had not filed for a speedy trial, there had been no discovery of documents and no Pre-Trial Conference.

[14] Annexed to Carrol Sela's Affidavit was a Schedule of Account in which under the Heading "Report", the Lautoka agent Krishneel Patel Lawyers had reported that the matter was to be Mentioned on 19 June 2020 "for Ruling". However, because the 'Ruling' (this is a reference to the Ruling dismissing the Respondent's application for Summary Judgment in the 2018 action) was delivered on that same day, 12 June 2020

(the date that the Lautoka agent appeared), Cromptons "*assumed that there was therefore no necessity to appear on 19 June 2020".* Carrol Sela deposed further that: Cromptons was never informed by either the Lautoka High Court Registry or the Respondent's Solicitors of the purpose for which the matter was being Mentioned on 19 June 2020, or that it was adjourned to be Mentioned on 26 June 2020, to the knowledge of Cromptons there had been no application by the Respondent's Solicitors to strike out the Defences and Counterclaims of both Appellants and to enter Default Judgment, there was no sealed unless order or notice of adjourned Hearing or Mention that warranted personal attendance, that had been served on Cromptons as Solicitors for the Appellants, the records of the court would show that the Appellants had '*vigourously defended'* both the 2016 and the 2018 actions, and that it would be unfair and unjust to allow the Default Judgment to remain.

[15] From the above it is clear that there was a contradiction between what transpired in court on 12 June 2020, and what was reported to Cromptons by its agent, Krishneel Patel Lawyers. The Respondent did not file an Affidavit in reply to Carrol Sela's Affidavit, and therefore its contents remained undisputed.

The Judgment of the High Court: Refusal to set aside Default Judgments in the 2016 and 2018 actions

[16] On 22 January 2021, court delivered Interlocutory judgments in both actions declining the application to set aside the Default Judgments. Being aggrieved by the Judgments of the High Court, the Appellants have appealed to this court against both Default Judgments.

The grounds of appeal

[17] The grounds of appeal from the Default Judgment entered in both actions are identical, except that from the judgment in the 2016 action there are 5 grounds of appeal, and from the Default, Judgment entered in the 2018 action there are 4 grounds of appeal. However, ground 3 flowing from the Judgment in the 2018 action, is different from

ground 3 in the 2016 action. In addition, in the appeal from the Judgement in the 2016 action, the Appellants urge that since there was no cause of action pleaded against the 2nd Appellant, no judgment could have been entered against him. The grounds urged in both appeals will be considered in common.

Grounds of Appeal-from the Default Judgment in HBC 177 of 2016

1. *In declining to set aside judgment as sought, the learned Judge erred in law in applying the test for irregularity by inter alia:*
   (a) Considering whether the Default Judgment ……entered by the respondent on 9th July 2020 Default Judgment was irregular separately from the irregularity of the order striking out the 1st 10 second appellants defense and Counterclaim striking out order.
   (b) By applying the wrong test

   When in any event the Default Judgment was based on and……was based on and inextricably linked to the Striking out Order and the Striking Out Order had included a direction to enter Default Judgment.

2. *The Learned Judge erred in law for a reason that was not advanced before him, namely that the terms of the Default Judgment were irregular, defective, and unenforceable in that they failed to specify that the First and Second Appellants or either of them were to pay any sum of money to the Respondent.*

3. *Alternatively, if the Learned Judge correctly found that the Default Judgment was regular, then he erred in law by, inter alia wrongly applying the rule that an application to set aside a regular Default Judgment must be supported by an Affidavit of merits as an absolute rule, and omitting to consider whether (and accordingly to find that) there was sufficient reason to grant the application without such an Affidavit in this case, because among other things-*

   (a) the Default Judgment, if valid, purported to make the First Appellant liable to pay the Respondent for damages when, on the face of the Sale Agreement pleaded as the cause of action (Sale Agreement) (and of which the Court was aware, as it was on the Court file as an exhibit as a result of a recent unsuccessful application by the Respondent for

summary judgment in the related Civil Action No. 182 of 2018 (High Court Action):

(i) *the Sale Agreement was a sale of business and business assets (and <u>not</u> a sale of shares) by the First Appellant as Vendor to the Second Appellant*

(ii) *the Respondent, as a guarantor under the Sale Agreement, was not a party entitled to any moneys under the Sale Agreement and was not entitled under the Sale Agreement to claim against the First Appellant (the Vendor and the only party with the right to moneys under the Sale Agreement)*

(iii) *the Respondent was not entitled to any moneys from any party to the Sale Agreement if the Sale Agreement was breached.*

(b) *the Learned Judge had already in his Decision on 26 June 2020 dismissing the Respondent's application for summary judgment in the High Court Action found that the Respondent had not shown that the First and Second Appellants' Defence was devoid of any real prospect of success and there were significant defences raised by the First and Second Appellants*

(c) *on the basis of the matters pleaded in the Statement of Claim filed in Civil Action No. HBC 177 of 2016 alone, it would not be possible for the Respondent to claim damages against the First and Second Appellants in that:*

(i) *he alleged (at paragraph 2 if the Statement of Claim) that he had "sold the First Appellant" to the Second Appellant and that consequently the First Appellant owed him money.*

(ii) *in such an event:*

(A) *the First Appellant could not owe the Respondent money as a result of the sale, as the First Appellant was the subject of the sale or*

(B) *if a result of other events, the First Appellant owed the Respondent money, the Second Appellant could not be liable for that money.*

(iii) *the Statement of Claim does not appear to seek relief of any kind against the Second Appellant in any event.*

4. *The Learned Judge erred in not setting aside the Striking Out Order on the grounds, inter alia that-*

(a) the Court had no jurisdiction to make the Striking Out Order under the High Court Rules 1988 or under inherent jurisdiction in the circumstances of the case.

(b) alternatively, the Striking Out Order had been made when –

(i) no "unless" order had been made by the Court and served on the First and Second Appellants

(ii) the First and Second Appellants' solicitors had genuine reasons for not appearing in Court on each of
(A) 19 June 2020 and
(B) 26 June 2020

(iii) the First and Second Appellants' solicitors had not been notified by the Court of the mention on 26 June 2020.

5. *The Learned Judge erred in law and fact in relying on the Affidavit of Larry Simon sworn on 21 September 2020 and the Affidavit of Tuni James Beddoes sworn on 22 October 2020 when they had not been filed i*n Civil Action No. HBC 177 of 2016.

Additional Grounds of Appeal-from the Default Judgment in HBC 182 of 2018

[18] In the appeal against the Default Judgment in HBC 182 of 2018 action, the following additional grounds of appeal are pleaded:

"*(c) on the basis of the matters pleaded in the Statement of Claim filed in Civil Action No. HBC 177 of 2016 alone, it would not be possible for the respondents to claim damages against the First and Second Appellants in that:*

(i)he alleges (at paragraphs 13 and 18-21 of the Statement of Claim that the Second Appellant was obliged to pay him under the Sale Agreement, and subsequently did not pay him, the sum of USD$600,000 [which contention the Second Appellant denies in any event as the Respondent was not a seller in the Sale Agreement]. The Respondent does not anywhere in the Statement of Claim allege that the First Appellant was obliged to pay him money

(ii) while the Statement of Claim seeks by way of relief judgment against First Appellant, no cause of action is alleged against the First Appellant"

Discussion of the grounds of appeal

<u>Ground 1: Were the Appellants precluded from applying to set aside the Striking Out of Pleadings & the Default Judgment in a single application?</u>

[19] The essence of this ground of appeal is whether in this case, the order entering Default Judgment and the order striking out the Statement of Defence and Counterclaim, are part and parcel of one order, or whether they were distinct orders which required the Appellants to apply to set them aside, separately.

In paragraph 7 of the Judgment the court said:

> *[7] As a result of the defendants 'second consecutive non-appearance and the directions made on 26.6.2020 the plaintiff proceeded to seal the said Orders of the court on 30.06.20 which was filed and served on the defendants Solicitors the orders of the court were as follows:*
>
> 1. *That the 1st Defendant's Statements of Defence and Counterclaim dated 19th September 2018 and the 2nd Defendant's Amended Statements of Defence and Counterclaim filed on 3rd June 2019 is hereby struck out due to the second non-appearance by the Defendants.*
>
> 2. *That the plaintiff to enter Default Judgment under Order19r.3 for his liquidated claim."*

Refusal to set aside the Default Judgments

[20] After having heard parties, the court refused the application of the Appellants to set aside the Default Judgments. The court said that the Statements of Defence and the Counterclaims had been struck out under its inherent jurisdiction due to the second consecutive non-appearance by the Appellants, and until the Appellants first set aside the Default Judgment which had been entered regularly, they are not entitled to be heard in support of their application for reinstatement of their Statements of Defence and

Counterclaims, and that the Respondent entered judgment by default in default of pleadings.

[21] The inherent jurisdiction of court is described In Halsbury's laws of England, (4th Ed. Reissue, Vol.37, 2001,p.20) as:

> *"The jurisdiction of the court which is comprised within the term inherent is that which enables it to fulfill properly and effectively its role as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise(i) control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process;(2) control over persons, As for example over miners and mental patients and officers of the court; and (3) control over the powers of inferior courts and tribunals.*
>
> *In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them'.*
> [Emphasis added]

[22] Applying the principles governing the exercise of the inherent jurisdiction of court to the facts of this case, it is not difficult to conclude that the court overlooked considering relevant facts presented to it, as well as its own previous conclusions on relevant

matters. Having struck out the Statements of Defence and Counterclaims, they ceased to be part of the record, and that was the basis on which the court held that the Default Judgment was entered in default of Pleadings. If the Statements of Defence and the Counterclaims had not been struck out, the court could not have entered Default Judgment as it did, based on default of pleadings. Therefore, the entering of the Default Judgment and the Striking Out of the Statements of Defence and Counterclaims became a single process and were intrinsically linked. This conclusion is fortified by the court's order made on 26 June 2020 which states "*Proceedings concluded."*

[23] Applying to set aside the Default Judgment necessitates the reopening of the concluded proceedings. In this case, the last act of court in those proceedings was the entering of the Default Judgment. The first step in restoring the *status quo ante* is the setting aside of the Default Judgment. Logically, it is only after that is done, that the setting aside of the striking out can be done, especially in a case in which the court has made order that proceedings are concluded. Therefore, the learned High Court Judge erred in holding that the Appellants are not entitled to be heard in support of the reinstatements of their Statement of Defence and Counterclaim, until they first set aside the default judgment. Ground 1 of the grounds of appeal is therefore allowed.

Ground 2- ***Non-compliance with O.19.r.2(i) of the High Court Rules, 1988***

[24] This ground of appeal is common to both interlocutory judgments and had not been taken up in the High Court at the leave stage, and the Respondent objects to it being considered in appeal. However, a new ground can be entertained in appeal as a matter of justice. The Appellants rely on the judgment in **Singh v Dass** [2019] EWCA Civ 360 (07 March 2019 at [15], where in considering when to entertain a new ground of appeal, Haddon -Cave LJ said:

> *"[17] Second, an appellate court will not generally permit a new point to be raised on appeal if that point is such that either it would necessitate new evidence or had it been run below it would have resulted in the trial being conducted*

> *differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ at [30 and [49].”*

[25] Since this is an appeal against an interlocutory judgment and not a judgment after trial, the criteria relating to fresh evidence does not arise and it being a purely legal question can be properly dealt with in appeal. In the 2016 action the court made order that:

> “*It is this day ajudged that there be judgment in favor of the plaintiff in a sum of USD 134 033.00 with interest and costs to be assessed by the court.*

In the 2018 action the court made order that:

> *“It is this day adjudged that there be judgment in favor of the plaintiff in the sum of USD 600,000 with damages interest and costs to be assessed by the court.”*

[26] O.19 r.2(1) of the High Court Rules, 1988 specifies that when final decree is entered, it must be entered against a specific defendant. The Appellants contend that the impugned Default Judgments do not specify which of the Appellants is to pay a specific amount of money to the Respondent, and that therefore they were *ex facie* irregular and unenforceable and should be set aside as a matter of law.

[27] The Respondent submits that the 2nd Respondent was included as a party because he was a director and a member of the 1st Appellant company, but it is ultimately the 1stAppellant who is responsible for the balance of the sum claimed by the Respondent. In the Statement of Claim in the 2016 action, the Respondent claimed the sum of USD $ 134,033.00 from the 1st Appellant only.

[28] In respect of the 2018 action, the Respondent argues that the claim was against both Appellants and therefore urges this court to presume that the judgment must be deemed to be against both Appellants. I am unable to accept this argument as it ignores the possibility that not every defendant would ultimately be held liable at the end of a trial.

Therefore, the need to specify the judgment debtor is a requirement that cannot be dispensed with.

[29] I am therefore not persuaded that there is no need for specificity and compliance with O.19 r.2(i) of the High Court Rules, 1988. Accordingly, the court erred when it failed to specify in the judgment which Appellant is obliged to fulfil the judgment sum. Therefore, ground 2 of the grounds of appeal is allowed.

Ground 3: ***Is an Affidavit on the merits an invariable condition precedent to the exercise of discretion to set aside Judgment by Default?***

[30] O.19 r.9 of the High Court Rules, 1988 provides that "*The court may on such terms as it thinks fit set aside or very any judgment entered in pursuance of this Order."* It is always a matter for the court to decide on the evidence before it by looking at the conduct of the parties and make a realistic assessment, whether as a matter of justice, a Default Judgment must be set aside, and if so what evidence is needed to do so.

[31] The learned Judge's refusal to set aside the Default Judgment because there was no Affidavit in the merits was inconsistent with His Honour's unequivocal findings in the decision refusing Summary Judgment that, the Respondent had not established that the Appellants had no meritorious defence, and more importantly, that the Appellants had presented "*a number of significant defen*ces".

[32] The inherent discretion of the court requires the court to bring its mind to bear on all matters that are reflected in the record and make an independent decision on whether there is a meritorious defence. In my view, the mere fact that an Affidavit in support sets out defences which are claimed to be meritorious would not by itself, be determinative of the matter.

[33] Therefore, it was incumbent on the court to consider the totality of the circumstances under which the Default Judgment was entered, and view the application of setting aside

default, in a holistic and realistic manner, always bearing in mind that the interest of justice requires that a party is not deprived of its right to either prosecute its claim or defend a claim against itself.

[34] Whilst it would be open to the Respondent to argue as he has done, that the Appellants are now giving a "perverse' interpretation to the contract that the parties executed, that *per se* does not warrant the court presuming that the Appellants have no meritorious defence. Therefore, the order refusing to set aside the Default Judgment on the basis that there was no Affidavit on the merits was without basis. Accordingly ground 3 of the grounds of appeal is allowed.

Ground 4: Was the striking out of the Statements of Defence and the Counterclaims justified in all the circumstances of this case?

[35] The power to strike out an application or defense is one of the most powerful tools in the armoury of the court, which must be used sparingly, and only when necessary to meet the interests of justice and to prevent the abuse of the process of court. Repeated contumelious and wilful disregard for the directions of court would undoubtedly fall within conduct that justifies a court striking out a Statement of Claim or refusing to set aside a Default Judgment. In this case, there had been no disregard for an order of court, no unless order having been made. Further, the evidence was that the Appellants were unaware of the next date. Therefore, the absence cannot be classified as disobedience or inexcusable conduct, warranting the extreme measure of Striking Out and non-suiting a party.

[36] The Appellants' non-appearance on two occasions was explained in the Affidavit filed on behalf of the Appellants and was not challenged or discredited. The fact is the Appellants' Counsel were unaware of the requirement to appear on the dates fixed by court, nor had any direction in the form of an "unless order' been issued by the court.

Had such an order been issued, the Appellants' Counsel would have been on notice of (i) the first default, and (ii) the next date for appearance.

[37] If a sanction is imposed in the form of an unless order and it is communicated, then the sanction takes effect without a further application, unless the party in default applies for relief to escape the consequences of the sanction, in which case the court will decide whether the sanction must apply. In any event, before making conditional orders particularly orders relating to striking out or dismissal of claims or defences, court must carefully consider all the consequences that would result, if the sanction is disobeyed.

[38] In this case, no unless order had been made, and therefore before striking out the Statements of Defence and Counterclaim, the court ought to have considered the fact that the Appellants did appear in court on 12 June 2020 when the court dismissed the Respondent's application for Summary Judgment. The dismissal was a clear indication that the court had formed the view that the Appellants did have a meritorious defence. A defendant who had been assured that his case was meritorious and warranted a trial would surely not avoid appearing at the trial, or follow up on the next steps. Therefore, when the Appellants did not appear in court on 19 June 2020, justice required that the court ensures that the Appellants be informed of the next date and that most importantly, that it was going to be a date on which the case would be fixed for trial. This was not done.

[39] In taking the extreme step of striking out the Statements of Defence and Counterclaims, the court had to be satisfied that the conduct of the Appellants unequivocally showed that they had deliberately failed to appear in court with the intention of thwarting the proceedings, that they did not intend to diligently pursue their defence and Counterclaim, and their non-appearance was contumelious, leaving the court with no option, but to conclude that the interests of justice required it to exercise its discretion to strike out the Statement of Defence and the Counterclaim and enter Default Judgment However, in this case the court overlooked relevant considerations and sped to a

conclusion that was at variance with the relevant facts. Thus, striking out the Statements of Defence and Counterclaims and entering Default Judgment against the unwittingly absent Appellants, and the subsequent refusal to set aside a Default Judgment entered in such circumstances, was not a fair exercise of discretion. In the result, the Appeal is allowed.

Conclusions

[40] Whilst the conduct of the Solicitors could be regarded as careless, or even arising out of an unjustified assumption, in fact the absence was due to a genuine and valid reason, and in the absence of an unless order, the striking out of the Statements of Defence and Counterclaims and the entering of Default Judgments, was totally disproportionate and highly prejudicial to the parties' interest. In these circumstances, justice required the Default Judgments should have been set aside promptly. Accordingly, ground 4 of the grounds of appeal is allowed.

Clark, JA

[41] I have read in draft the judgment of Her Honour Jameel, JA and agree with the orders proposed for the reasons she gives.

Orders of the Court

1. *The appeal is allowed.*
2. *The judgments of the High Court dated 22 January 2021 in HBC 177 of 2016 and HBC 182 of 2018 are set aside.*
3. *The Orders of the High Court dated 26 June 2020 in HBC 177 of 2016 and HBC 182 of 2018 striking out the Statements of Defence and Counterclaim of the Appellants, are set aside.*
4. *The Respondent will pay to the 1st and 2nd Appellants jointly, a sum of $3000.00 as costs.*

Hon. Mr. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL
FIJI

Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL