IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 173 of 2015

BETWEEN : **ANITA SUBAMMA** of Vunisalato Road, Bountiful Estate, Namaka, Nadi.

PLAINTIFF

AND : **ARK COMPANY LIMITED**, a limited liability company having its registered office at Lot 1, Queens Road, Martintar, Nadi, Fiji

1st DEFENDANT

AND : **KAMAL SEN and ANISH KUMAR** both of Nadi, Company Directors.

2nd DEFENDANT

Mr. Roopesh Prakash Singh for the Plaintiff
Mr. Anil Jatinder Singh for the Defendants

Date of Hearing : - 17th October 2016
Date of Ruling : - 13th January 2017

RULING

(A) INTRODUCTION

(1) The matter before me stems from the first Defendant's summons dated 05th July 2016 seeking the grant of the following Orders;

> *1. That there be stay of execution of the Default Judgement entered against the First Defendant on 29th January, 2016.*

2. *That the Default Judgment so entered in this matter be set aside and the First Defendant be given unconditional leave to file its Defence and defend the within action on merits.*

3. *That cost of the application be costs in the cause.*

(2) The application is made pursuant to Order 19, rule 9 of the High Court Rules of Fiji, 1988 and the inherent jurisdiction of the Court.

(3) The First Defendant's Summons is supported by an Affidavit sworn by Kamal Sen, the First named Second Defendant.

(4) The First Defendant's application is vigorously contested by the Plaintiff.

(5) The Plaintiff filed an 'Affidavit in Opposition' opposing the application followed by an 'Affidavit in Reply' thereto.

(6) The Plaintiff and the First Defendant were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the First Defendant filed careful and comprehensive written submissions for which I am most grateful.

(B) THE BACKGROUND

(1) The Statement of Claim alleges, in paragraphs 01 to 16 that;

1. *THAT the 1st Defendant is a limited liability company registered on the 1st of November 2006 with a nominal share capital of $10,000.00, divided into share of $1.00 each.*

2. *THAT at all material times the 1st Defendant was a "shelf company" and the atler-ego of the 2nd Defendants.*

3. *THAT the 2nd Defendants at all material times were both Directors of the 1st Defendant Company.*

First Cause of Action Fraudulent Misrepresentation

4. *THAT the 2nd Defendants at all material times were both Directors of the 1st Defendant company.*

5. *THAT the 2nd Defendants promoted the 1st Defendant.*

6. *THAT in order to induce the Plaintiff to purchase shares and provide a loan, the 2nd Defendants made the following representations and statements, orally and in writing, to her, namely;*

PARTICULARS OF MISREPRESENTATION

(a) *That the 1st Defendant is embarking on a major project in constructing a Mini South Pacific Cultural Entertainment Centre to be constructed in Wailoaloa, Nadi.*

(b) *Once completed, the centre will generate a net income of $10,000,000.00 (TEN MILLION DOLLARS) per year.*

(c) *The 1st Defendant is a financially sound company.*

(d) *An investment with the 1st Defendant will yield high returns.*

(e) *The 2nd Defendants were experts of running a company for investment purposes.*

(f) *The Plaintiff was getting a very good sound business deal.*

(g) *The Plaintiff will only need to provide a very short-term loan which will be paid back on or before the 1 of September 2015 which promise was made by virtue of a Memorandum of Understanding (hereinafter referred to as the MOU) entered between the parties on the 26 July 2013.*

(Collectively hereinafter referred to as "the representations").

7. *THAT the said representations were contained in document called the "Financial Projection for 12 months" and made orally, which was prepared and done for the purpose of inducing persons to apply for and purchase of shares in the 1st Defendant and to loan monies to the 1st Defendant. These representations were made in or about sometime in April 2013.*

8. *THAT the said representations were and each of them was untrue.*

PARTICULARS OF UNTRUE AND FALSE REPRESENTATIONS

(a) *There was no project in substance to construct a Mini South Pacific Cultural Entertainment Centre.*

(b) *The Centre was not even started. The projection and all particulars stated therein were untrue.*

(c) *The 1st Defendant was not an operating company and did not own any assets nor any land in Wailoaloa, Nadi nor any arrangement in place to utilize a land situate at Wailoaloa, Nadi.*

(d) *All monies paid has been appropriated and used by the 2nd Defendants for their own personal benefit.*

(e) *The 2nd Defendants are not competent Directors.*

(f) *There has been no return on the Plaintiff's return.*

(g) *The Defendants refused and have neglected to repay the sum of $120,000.00 to the Plaintiff as agreed in the MOU.*

9. *THAT the 2nd Defendants at the time when they made or caused the representations to her made/knew them to be false and untrue, or made them recklessly not caring whether they were true or false.*

10. *The 2nd Defendants made or caused to be made the said representations in order to induce the Plaintiff to buy and become the holder of the shares in the 1st Defendant.*

11. *THAT the Plaintiff believed and was induced by the representations and paid the following sums of monies;*

PARTICULARS OF MONIES PAID

Receipt No. 00001 dated 26/7/2013	-	*$ 64,000.00*
Receipt No. 0002 dated 13/8/2013	-	*$ 56,000.00*
TOTAL		*$120,000.00*

12. *THAT the Plaintiff and 2nd Defendants as representations of the 1st Defendant entered into a Memorandum of Understanding on the 26th of July 2013, wherein the Defendants agreed to refund the sum of $120,000.00 (ONE HUNDRED AND TWENTY THOUSAND DOLLARS) to the Plaintiff, within sixty (60) days from 1st September 2013.*

13. *THAT the said shares so purchased by the Plaintiff were and have ever since been worthless and in breach of the Memorandum of Understanding the Defendants have failed to refund the Plaintiff the said sum of $120,000.00 (ONE HUNDRED AND TWENTY THOUSAND DOLLARS).*

14. *THAT the Plaintiff paid the Defendants the sum of $150,000.00 (ONE HUNDRED AND FIFTY THOUSAND DOLLARS).*

15. *THAT for the reasons aforesaid, the 2nd Defendants have acted fraudulently and dishonestly without care of the Plaintiff's investment and made the representations complained for their personal gain.*

16. *THAT for the reasons aforesaid the damages suffered by the Plaintiff has been aggravated.*

(2) The Plaintiff claims from the First and Second Defendants;

a) *Refund of the sum of $150,000.00 (ONE HUNDRED AND FIFTY THOUSAND DOLLARS).*

b) *That the Defendants be restrained from removing from the Jurisdiction of this Honourable Court or otherwise dissipating, charging or dealing with any of their assets in the same Jurisdiction.*

c) *Damages for fraudulent conduct.*

d) *Exemplary, punitive and aggravated damages.*

e) *Interest on any monetary award.*

f) *Costs of this action on client/solicitor indemnity basis.*

(C) THE STATUS OF THE SUBSTANTIVE MATTER

(1) According to the Affidavit of Service filed by the Plaintiff on 26th January 2016, the Writ of Summons was served on the First Defendant on 21st December 2015.

(2) On 27th January 2016, the Plaintiff having searched and finding that the First Defendant failed to give Notice of intention to Defend within the prescribed time entered Default Judgment against the First Defendant on 29th January 2016.

(3) The sealed Default Judgment reads as follows;

DEFAULT JUDGMENT

NO ACKNOWLEDGEMENT OF SERVICE OF WRIT OF SUMMONS having been filed by the 1st Named Defendant herein, IT IS THIS DAY ADJUDGED that:-

(a) There be Default Judgment against the 1st Named Defendant in the sum of $150,000.00 (ONE HUNDRED FIFTY THOUSAND AND DOLLARS).

(b) General and exemplary damages, interest and costs be assessed by the Court

(4) The First Defendant's Summons to set aside the Default Judgment was filed on 06th July 2016. I note without comment that the First Defendant's Summons to set aside Default Judgment was filed about six (06) months after the Writ had been served on the first Defendant.

(D) THE LAW

(1) Against this factual background, before turning to the substantive submissions, it is convenient to indicate something of the relevant law.

(2) Rather than refer in detail to the various authorities, I propose to set out, with only very limited citations, what I take to be the principles remain in play.

An application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action has never been heard on the merits.

A Defendant against whom judgment in default has been entered may apply for it to be set aside under Order 13, rule 10 or under Order 19, rule 9 of the High Court Rules.
In situations where the Defendant has failed to file in the first instance, notice of intention to defend, then order 13 procedure is the correct process.

Order 19 is applicable only where, after notice of intention to defend is filed, no statement of defence had followed.

❖ **THE PRINCIPLES OF SETTING ASIDE DEFAULT JUDGMENTS**

A default judgment can be obtained regularly or irregularly and both of these forms of judgments can be set aside.

However, there is a distinction between setting aside a default judgment for irregularity and setting aside a judgment which was in fact regular.
Fry L J in **Alaby –v- Praetorious [1888] 20 QBD 764** at 769 succinctly drew the distinction as follows:-

> *"There is a strong distinction between setting aside a default judgment for irregularity in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular has been obtained through some slip or error on the part of the Defendant in which case the court has a discretion to impose terms as a condition of granting the Defendant relief."*
>
> (Emphasis added)

This principle was adopted and applied by the Fiji Court of Appeal in **"Subodh Kumar Mishra v Rent-a-car"**(1985) 31 FLR 52. Thus, where an irregular default judgment is entered (for example time for acknowledging service or for serving a defence had not expired by the time the default judgment was entered) which irregularity cannot be cured the Defendant is entitled as of right to have the judgment set aside.

However, where the default judgment had been entered regularly, the Court has a wide discretion and neither Order 13, rule 10 nor Order 19, rule 9 of the High Court Rules impose any restriction in the manner in which the discretion is to be exercised
The rationale for the unconditional discretion that allows the court to intervene is explained by Lord Atkin in **"Evans v Bartlam"**, 1937 DC 473 as follows;

> *"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 only been obtained by a failure to follow any of the rules of procedure."*

Lord Atkins pronouncement was endorsed and followed by the Fiji Court of Appeal in **The Fiji Sugar Corporation v Mohammed Ismail** FLR,Vol 34, p75.

The Principles applicable for analysis of the merit of an application to set aside a default judgment are well known and settled. The leading authority is **Evans –v- Bartlam** [1937] 2 All E.R. 646. The following passage from the judgment of Lord Atkin in **"Evans v Bartlam"** is pertinent in the subject of principles on which a court acts where it is sought to set aside a regular Default judgment;

> *"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.....The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

The principles of that case have been widely adopted in Fiji, and by the Fiji Court of Appeal in **Pankanji Bamola & Anor. –v- Moran Ali** Civil Appeal No. 50/90 and **Wearsmart Textiles Limited –v- General Machinery Hire & Anor** Civil Appeal No. ABU0030/97S.

In **"Pankaj Bamola & Anor v Moran Ali"** (supra) the Court of Appeal held;

> *It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the court must form a provisional view of the probable outcome of the action.*

In **Russell v Cox 1983 NZLR 654, McCarthy J** held;

> *"In approaching an application to set aside a judgment which complies with the rule, the Court is not limited in the considerations to which it may have regard, but three have long been considered of dominant importance.*

They are;

1. That the defendant has a substantial ground of defence;
2. That the delay is reasonably explained;
3. That the plaintiff will not suffer irreparable injury if the judgment is set aside.

A useful summary of the factors to be taken into consideration is to be found under notes to Or. 13, r9/14 of **THE SUPREME COURT PRACTICE 1995** Vol. I at p.142 and which is, inter alia, as follows:-

> *"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has 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. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred.*

Therefore the judicially recognised "Tests" may be conveniently listed as follows;

(a) Whether the Defendant has a substantial ground of defence to the claim.

(b) Whether the Defendant has a satisfactory explanation for the default judgment.

(c) The promptness with which the application is made.

(d) Whether the setting aside would cause prejudice to the Plaintiff.

❖ **THE DEFENCE ON THE MERITS**

The major consideration on an application to set aside a default judgment is whether there is a defence on the merits. The purpose is to avoid injustice. The Defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with the rules; this is not something which the court will do lightly.

In **Shocked v Goldsmith**(1998) 1 All ER 372 at 379ff Legatt LJ said:

> *"These cases relating to default judgment are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and any delays, as well as against prejudice to the other party."*

The leading case is **Evans v Bartlam** [1937] 2 All 646, [1937] AC 473. In this case, the defendant had suffered judgment to be entered against him in default of appearance. The Court of Appeal ([1936] 1 KB 202) allowed an appeal from the judge's order setting aside the judgment. But the House of Lords reversed the decision of the Court of Appeal and restored the Judge's order.

Lord Wright ([1937] 2 All ER 646 at 656, [1937] AC 473 at 489) expressed the conclusion;

> *"In a case like the present, there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication... The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion, is empowered by the rule to impose."*

In **Vann V Awford** (1986) 130 SJ 682, the judge declined to set aside a judgment given against the second defendant in default of appearance, and also a judgment given against him when damages were assessed in his absence. The Defendant had lied when he said on oath that he had no knowledge of the proceedings. On appeal **Dillon LJ** considered that, despite the prejudice to the plaintiffs, as there were ample arguable defences the award should be set aside and there should be a fresh hearing. He added: "Even for lying and attempting to deceive the court, a judgment for £53,000 plus is an excessive penalty if there are arguable defences on the merits."

This case was followed two weeks later by **The Saudi Eagle [1986] 2 Lloyd's Rep 221**. After reviewing **Evans v Bartlam and Vann v Awford**, Sir Roger Ormrod came to the conclusion that the defendants in the case before the court had failed to show that their defence enjoyed a real prospect of success.

These cases relating to default judgments are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's

explanation both for the default and for any delay, as well as against prejudice to the other party.

❖ **THE YARDSTICK THAT HAS TO BE APPLIED IN DETERMINING THE MERITS OF THE DEFENCE**

The Defendant must have a case with a real prospect of success, and it is not enough to show a merely arguable defence. *(**Alpine Bulk Transport Company v Saudi Eagle Shipping Company, 1986 2 Lloyds Report, P 221).***

It must both have "a real prospect of success" and "carry some decree of conviction". Thus the court must form a provisional view of the probable outcome of the action. Unless potentially credible affidavit evidence demonstrates a real likelihood that a Defendant will succeed on fact, no real prospect of success is shown and relief should be refused. **(Wearsmart Textiles Ltd v General Machinery Hire Ltd, (1998) EJCA 26.)**

A person, who holds a regular judgment even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than merely arguable case is needed to tip the balance of justice to set the judgment aside. **(Moore-Bick J in International Finance Corporation, (2001) CLC 1361).**

The real prospect of success means that the prospects must be better than merely arguable. The word "real" directs the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success. It saves expense, achieves expedition, avoids the courts resources being used up in cases where that serves no purpose and is in the interest of justice.

There is no room for speculative defences and potentially credible affidavit evidence must demonstrate a real likelihood that a defendant will succeed. Otherwise no real prospect of success is shown and relief should be refused (**Allen v Taylor**) [1992] PLQR 255)

The test was considered in detail in **Swain v Hilman** (2001) (1), All E.R. 91 and the court confirmed that;

> *"The test is the same as the test for summary judgment. The only significant difference is that in a summary judgment application the burden of proof rests on the claimant to show that the defendant has no real prospect of success whereas in an application to set aside a default judgment it is for the defendant to show that his defence has a real prospect of success.*

❖ **DELAY**

An application to set aside default judgment must be made "promptly" and without "delay".

In **"Pankaj Bamolc and Another v Moran Ali" FCA 50/1999**, a party seeking to set aside an Order had delayed for nearly 08 months. The Court took the view that no adequate explanation had been provided for that and concluded that the application should be refused because it had not been made promptly and without delay.
Promptness will always be a factor of considerable significance and, if there has been a marked failure to make the application promptly, a court may well be justified in refusing relief, notwithstanding the possibility that the Defendant may well succeed at the trial.

Whether or not there is a defence on the merits may be, the dominant feature to be considered but that does not mean that it cannot be swamped by other features such as unexplained delay in bringing the application to set aside the judgment.

Although the fact that damages have been assessed and a final judgment entered does not deprive the court of jurisdiction to set aside a default judgment; it is highly relevant to the exercise of discretion. It is an aspect of, but separate from, the question of delay. The ***Saudi Eagle*** **case** *(supra)* is clear authority for the proposition that an application to set aside a default judgment can be made notwithstanding that final judgment has been entered.

In **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc (The Saudi Eagle) [1986] 2 Lloyd's Rep** the defendants, believing that they had no assets, deliberately allowed an interlocutory judgment for damages to be assessed to be entered against them by default, and only after damages had been assessed and final judgment entered, realising that they had given security, applied initially to the judge and then on appeal to the Court of Appeal, unsuccessfully at both hearings, to set aside the judgment and for leave to defend. The application was refused on the merits; but it was not suggested that the judge would not have had jurisdiction to set aside the judgment had it been appropriate to do so. Therefore, it cannot be said that a judgment (by default) for damages to be assessed is spent once damages are assessed; it remains the source of the plaintiff's right to damages. Nor can it be said that in such a case the interlocutory judgment is overtaken or superseded by the final judgment for a liquidated sum; it would be more accurate to say that it is completed and made effective by the assessment.

It cannot be safely assumed in every case that any prejudice to the plaintiff can be met by putting the defendant on terms to pay the costs thrown away by the assessment hearing. There can be no rigid rule either way; it depends on the facts of the particular case.

❖ PROCEDURE

An application to set aside a default judgment which has not been entered wrongly must be supported by evidence. Commonly, a draft defence is attached to the affidavit in support of the application.

A draft defence is not necessary, what is required is the affidavit of merits. **(The Fiji Sugar Corporation Ltd. v Mohammed Civil Appeal No. 28/87.)**

If the Defendant does not have an affidavit of merits, no setting aside order sought to be granted except for some very sufficient reason. **(Wearsmart Textiles Ltd v General Machinery Hire Ltd, (1998) FJCA 26.)**

In ***Wearsmart Textiles Ltd v General Machinery Hire Ltd*** [1998] FJCA 26; ***Abu0030u.97s (29 May 1998)*** the Fiji Court of Appeal cited the following passage from the Supreme Court Practice 1997 (Volume 1) at p.143.

> *"Regular judgment – if the judgment is regular, then it is an 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).*
>
> (My emphasis)

> *"it is an (almost) inflexible rule that there must be an affidavit of merit i.e. and affidavit stating facts showing a defence on the merits (FARDEN v RICHTER (1989) 23 Q.B.D. 124)" The Supreme Court Practice 1993 Or 13 r.9 p.137).*

> *"At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason" HUDDLESTON, B in FARDEN ibid p.129).*

❖ SETTING ASIDE ON CONDITIONS

In the exercise of Court's discretion, the court may attach conditions to an order to set aside judgment. In some cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In appropriate cases, the court may also require the defendant to pay money into court to await the final disposal of the claim. Such a condition is commonly imposed where,

1. The defendant has satisfied the court that it has a defence with a real prospect of success.

2. The Defendant has an explanation why he neglected to appear after being served.
3. The truth of which is indeed denied by the Plaintiff.

4. The court seeks no reason why the Defendant should be disbelieved in what appears to be a mere conflict on affidavits.

The conditions imposed on setting aside a default judgment are not intended to punish the defendant but to ensure that justice is achieved between the parties (**VIJAY PRASAD v DAYA RAM CIV** APP 61/90 FCA; **SUBODH KUMAR MISHRA s/o Ramendra Mishra v CAR RENTALS (PACIFIC) LTD** CIV APP 35/85 FCA). The said judgments do not lay down any basis upon which the discretion is to be exercised.

In **GARDNER v JAY (1885) 29 Ch.D 52** at p.58 **BOWEN L.J**. said on this aspect that:

> *"... when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the Actor the Rules did not fetter the discretion of the Judge why should the Court do so?"*

(E) ANALYSIS

(1) At the commencement of the oral hearing before the Court, Counsel for the Plaintiff raised an objection to the first Defendant's Summons to set aside the Default Judgment.

The objection raised is this;

> *"The application has been made under the wrong order of the High Court Rules, Order 19 rule 9 of the High Court Rules. This rule deals with a failure to file pleadings. The default judgment was entered in default of filing the acknowledgement of service/intention to defend. The correct order is under Order 13 Rule 10 of the High Court Rules."*

(2) Let me now move to examine the objection raised by the Plaintiff.

In the case before me , it is clear beyond a peradventure , that the first Defendant's application to set aside default judgment is made pursuant to Order 19, rule 9 of the High Court Rules, 1988.

I desire to emphasise that the application should have been made under Order 13, Rule 10 of the High Court Rules, 1988.

It is, of course, an elementary principal of the law relating to setting aside default judgments that Order 19 is available only where after "notice of intention to Defend is filed, no "Statement of Defence" had followed.

In situations where as in this case, the first Defendant had failed to file in the first instance, "Notice of intention to Defend", as required under Order 12 of the Rules, then Order 13 procedure is the correct process.

It seems to me clear beyond question that Order 19, Rule 09 has no application even by any stretch of imagination to the instant case. The instant case stands on an entirely different footing. The first Defendant's setting aside application should have been pursued under Order 13, rule 10. In the court's view, the mistake is fundamental, which cannot be rectified as mere non- compliance simply by the use of the court's discretion, under Order 2 of the Rules.

Leave that aside for a moment.

It seems tolerably clear that Order 13, rule 10 is completely ignored by the first Defendant.

Does it follow that the court is bound to ignore Order13, rule10 of the High Court Rules, because Order 13, rule10 is disregarded by the First Defendant whose duty is to regard it ?

Does it also follow that the court should treat Order 13, rule 10 as obsolete and of no consequence because the first Defendant has ignored it who is not alive to the importance of compliance with High Court Rules?

I must confess that I dissent from such propositions.

It seems to me that the Court would be acting contrary to its plainest duty if it refused to observe Order 13, rule 10, of the High Court Rules, 1988. The Rules are an indispensable framework for the orderly administration of justice. The principle is that the rules of court and the associated rules of practice, devised in the public interest to promote orderly administration of justice, must be observed.

In the context of the present case, I am inclined to be guided by the rule of law enunciated in the following judicial decisions.

In "**Ventakamma v Ferrier – Watson**" (CIV. APP. CBV0002/92), (Judgment delivered on 24th November, 1995) the Fiji Supreme Court held;

> ***"We now stress, however, that the rules are there to be obeyed. In future Practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal."***
>
> (Emphasis added)

In the decision of the Privy Council in **Ratnam vs Cumarasamy and Another [1964] 3 All E.R. at page 935;**

Lord Guest in giving the opinion of the Board to the Head of Malaysia said, *inter alia*:

> *"**The rules of court must, Prima facie, be obeyed**, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the Affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of appeal was exercised on any wrong principle."*
>
> (Emphasis Added)

I have no hesitation whatsoever in relying on the above judicial decisions in the instant matter before me. One word more, I can see no reason as to why the rule of law enunciated in the aforementioned judicial decisions should not be applied in the case before me.

On the strength of the authority in the above judicial decisions, I wish to emphasise that the rules are there to be followed and non-compliance with those rules is fatal.

Having said that, I venture to say beyond a per-adventure that the application in respect of setting aside the default judgment must fail for non-compliance with the High Court Rules.

In the result, I am constrained to hold that the First Defendant's Summons can go no further.

Accordingly, there is no alternate but to dismiss the Summons.

I cannot see any other just way to finish the matter than to follow the law.

(3) In view of the approach I have adopted, I do not consider it necessary for me to express my views on the merits of the application to set aside the default judgment. It will be at best a matter of academic interest only or at worst an exercise in futility to discuss the merits of the First Defendant's application.

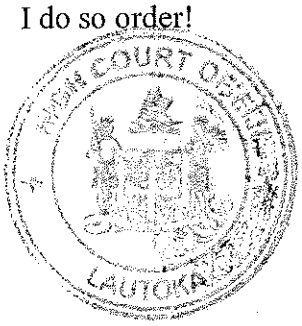
Essentially that is all I have to say!!!

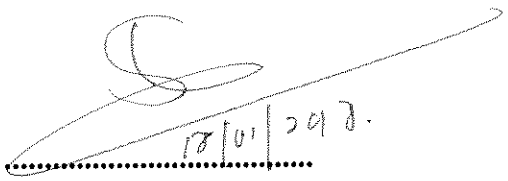
(F) ORDERS

(1) The First Defendant's Summons dated 05th July 2016 is dismissed.

(2) The First Defendant to pay costs of $500.00 [summarily assessed] to the Plaintiff within 14 days from the date hereof.

I do so order!





Jude Nanayakkara
Master

At Lautoka
17th January 2017