IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 239 of 2015

BETWEEN	:	**RAVIN NARAYAN SHARMA** of Lautoka City, Unemployed.
		Plaintiff
AND	:	**KAMAL PRASAD, ANISH PRASAD** and **URMILA PRASAD** all of Lautoka City trading as **VIJENDRA'S TAILORING CENTRE** of Yasawa Street, Lautoka
		Defendants
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. Raratabu for the Plaintiff Ms. Ravai for the Defendant
Date of Ruling	:	03rd April 2018

RULING

01. Before me is the Notice of Motion filed on 09.01.2017 by the defendants. It states that, the application is made pursuant to Order 2 rule 2 (2), Order 13 rule 10 and Order 19 rule 9 of the High Court Rule and the inherent jurisdiction of this court. The defendant by this motion sought the following orders from the court:

a. That, the default judgment entered against the defendants on the 15th day of November 2016 to be set aside,

b. That, the Statement of Defence and Counter Claim which was struck out on 16th day of September 2016 is to be reinstated in this action,

c. Such further and/or other orders as deemed necessary by this Honourable Court.

02. The Motion was supported by the affidavit sworn by the one Cedric Steven, the law clerk of the defendants' solicitors. The plaintiff opposed the Motion and filed the affidavit in

opposition which was later replied by an affidavit sworn by the first named defendant. The counsels for both parties agreed to dispose this motion by way of written submission and accordingly, they filed their respective submission citing the relevant authorities.

03. Since the Motion seeks to set aside the default judgment entered against the defendants, it would be prudent to briefly note the circumstances of entering default judgments, both final and interlocutory, and court's power to set aside the same, before embarking on the contentious issues to be decided by the court in this matter. There are various rules which allow entering judgments for default of the parties to an action. The rules (1 to 6) under Order 13 provide for entering default judgments for failure to give notice of intention to defend a matter, and the appropriate rule under that Order to be followed depending on the nature of the claims. Finally, the rule 10 under that Order provides for the discretion to set aside any of such default judgment entered in accordance with the various rules under that Order. The court can enter the judgment against the party who does not appear at the hearing of summons under Order 14 rules 1 and 5, and the judgment given may be set aside in terms of Order 14 rule 11.

04. The Order 16 rule 5 (2) allows the court to enter the judgment for default of a third party or the defendant and also gives discretion to set aside or vary the judgments so entered under that rule. Order 19 is similar to Order 13 in providing different rules depending on the nature of the claims. However, the rules under this Order apply, only if the defendant fails to file and serve the defence within the specified period. Again the rule 9 provides for the discretionary power to set aside the same. Finally, the court can give judgment when a party fails to appear on the trial date and the same judgment may be set aside under and by virtue of Order 35 rule 2. It should be noted here that, whenever the rules provide for entering default judgments, they also specifically provide for the discretion to set aside the same.

05. Since the courts given discretionary power to set aside the judgments entered for the default of any party, the courts have set the principles applicable and settled the law on exercising this discretion and setting aside a default judgement, both in common law jurisdiction and our local jurisdiction. There are number of authorities, which are frequently cited by the courts when exercising the discretion to set aside the judgments entered for the default of any party. *Anlaby v. Praetorius (1888) 20 Q.B.D. 764*; *Mishra v Car Rentals (Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985)*; *O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 762*; *Evans v Bartlam [1937] 2 All E.R. 646*; *Burns v. Kondel [1971] 1 Lloyds Rep 554*; *Fiji National Provident Fund v Datt [1988] FJHC 4; (1988) 34 FLR 67 (22 July 1988)*; *Eni Khan v. Ameeran Bibi & Ors (HBC 3/98S, 27 March 2003*; *Wearsmart Textiles Limited v General Machinery Hire limited and Shareen Kumar Sharma(1998) FJCA26; Abu 0030u.97s (29 May 1998)*; *Fiji*

National Provident Fund v Datt [1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988) are the most important foreign and local cases, to name a few. This court extensively discussed the principles in a recent case of ***Chand v M R Khan Brothers Transport Company [2017] FJHC 679; HBC197.2016*** which was decided on 19th of September 2017.

06. Mostly, the default judgments are entered either under Order 13 or Order 19, when a case is at the pre-trial stage, and the primary consideration, in setting aside, is whether the defendants have 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. However, the default judgment, which was entered against the defendants in the instant case, was not in accordance with any of the above procedures. The defendant duly filed the notice intention to defend which was followed by the statement of defence and counter claim. The plaintiff then filed the reply to the defence and defence to counter claim. After closure of pleadings, the plaintiff filed the summons for direction, which was returnable on 01.09.2016. There is no affidavit of service for the proof that, the summons for directions was served on the defendants. Neither the defendants nor their solicitors appeared on that day. However, the court made orders in terms of the summons and directed the plaintiff to file the Affidavit Verifying List of Documents. The matter was then adjourned to 16.09.2016. There was no representation for the defendants on that day too. The court then struck out the defence and counter calim for non-appearance for two consecutive days. The plaintiff then entered the default judgment on 15.11.2016. Upon service of default judgment, the defendants filed this Motion seeking orders mentioned above.

07. As I discussed above, the reasons and the procedure for entering default judgments are provided in the rules. However, the reason and the procedure for entering default judgment against the defendnats in this case is peculiar to the rules, the main question is whether the High Court Rules allow the court to strike out a defence for non-appearance of the defendant on *mention* days and also allow the plaintiff to enter the default judgment as he did in this case. If the above question is answered affirmatively, then rules should provide for the discretion too, to set aside the same. If it is answered negatively, then there is no option for the court than reversing the said order of striking out of the defence and counter claim, and reinstating the defence that was struck out. Unfortunately, neither the plaintiff nor the defendant advanced any argument on this this line. The defendant only argues that, the default judgement was irregularly entered, and on the other hand, the plaintiff states that, the supporting affidavit is not proper as it was deposed by the law clerk, and the defendant did not have intention to defend as they failed to appear on two consecutive days.

08. Since the plaintiff raised the concern on the supporting affidavit filed on behalf of the defendants, I must first deal this issue before finding the answer to the question raised in the preceding paragraph, as the argument of the plaintiff shakes up the base of the defendants' Motion. The plaintiff's counsel, citing several cases on swearing an affidavit by the law clerk, objected the supporting affidavit of law clerk of the defendants' solicitors, as it lacks the authority to do so.

09. The Order 41 of the High Court Rules deals with the matters connected with the affidavits that are filed in civil suits. There is no requirement, in any of the rules under this Order, for an authority for a person who swears an affidavit. The only rule, that provides for the contents of an affidavit, is the rule 5, which reads;

> ***Contents of Affidavit (O.41, r.5)***
>
> *5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*
>
> *(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*(Emphasis added).

10. According to the above rule, subject to the specific rules mentioned therein and paragraph 2 of the rule, a person, who is able to speak to of his own knowledge to such facts, can swear an affidavit to that effect. In this sense, the affidavit is equated to the oral evidence given in court. The **Supreme Court Practice (White Book) 1999** has the same rule under Order 41. The **White Book** reads;

> ***Contents of affidavit (O.41, r.5)***
>
> *5. (1) Subject to –*
> *(a) Order 14, rule 2(2) and 4(2);*
> *(b) Order 86, rule 2(1) and 4(1A);*
> *(ba) Order 88, rule 5(2A);*
> *(c) Order 113, rule 3;*
> *(d) Paragraph (2) of this rule, and*
>
> *An affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*
>
> *(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*

11. The only difference between our rules and the **White Book** is that, the exceptions are more in the **White Book** than our rules. The **White Book,** then explains the effect of this rule as follows;

> ***Effect of Rule***
>
> *This rule was taken from the former O.38, r.3. Its effect is to require that save in the excepted cases, an affidavit must contain the evidence of the deponent, as to such facts only as he is able to speak to of his own knowledge, and to this extent, equating affidavit evidence to oral evidence given in Court.*
>
> *The excepted cases are:*
>
> *(1) Affidavits under O.14, rr. 2 (2) and 4(2) either by the plaintiff or by the defendant;*
> *(2) Affidavits under O.86, rr. 2 (1) and 4 (1A) either by the plaintiff or defendant;*
> *(2A) Affidavits under O.86, r.5 (2A) in support of applications by a mortgagee claiming possession or payment;*
> *(3) Affidavits under O.88, r.5(2A) in support of applications by mortgagees for possession or payment;*
> *(4) Affidavits under O.113, r.3 on behalf of the plaintiff in summary proceedings for possession of land;*
> *(5) Affidavits for use in interlocutory proceedings; and*
> *Affidavits made pursuant to an order under O.38, r.3(2) that evidence of any particular fact may be given at the trial by statement on oath of information or belief.* (Emphasis added).

12. Accordingly, the affidavits, which are equated with the oral evidence, are the way of giving evidence and the person who has privy to any information may depose an affidavit to that effect. This was affirmed by the court in ***Vodafone Fiji Ltd v Pacificconnex Investment Ltd [2010] FJHC 419; HBE097.2008 (30 August 2010)*** and it was held that;

> *Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit.* (Emphasis added).

13. The exceptions are the Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), Order 41 rule 5 (2) and Order 38, rule 3. Accordingly, in any application under these exceptional rules, the respective parties should swear the affidavits. However, the plaintiff's counsel cited a

note that appears at page 117 of the **White Book 1967** in his submission in support of his argument of 'lack of authority'. His submission states that;

> *In the **Supreme Court Practice (1967) (The White Book)** the following note appears at page 117:*
>
> *'The affidavit may be made by the Plaintiff or by any person duly authorized to make it. If not made by the Plaintiff, the affidavit itself must state that the person making it is duly authorized to do so- **Chingwin –v- Russell (1910) 27 T.L.R. 21".***

14. In fact, the above note has, frequently, been cited by the courts in support of the argument which seeks the authority from the plaintiff to depose an affidavit. On the face of it, the above note makes the inference that, there must be an authority from the plaintiff, if the affidavit is not deposed by him. However, a careful reading of the said authority ***Chingwin –v- Russell*** reveals that, it was decided under Order 14 which is one of the common exceptions mentioned in both High Court Rules (Order 41 rule 5) and White Book 1999 as stated above. The following dictum of **Vaughan Williams L.J.** in that case makes it crystal clear that, the courts asked for the authority only in cases of exceptions, which require the respective parties to swear the affidavits, as identified by the above rules. His Lordship **Vaughan Williams** held that;

> *"Where an affidavit in support of a summons under Order 14 is sworn by a person other than the plaintiff he should state his means of knowledge and also the fact that he is authorized to make the affidavit."*

15. Therefore, it is my considered view that, the case (***Chingwin –v- Russell)*** decided under the exception (Order 14) should not, generally, be applied to all the affidavits in the civil suits. In that case, His Lordship **Vaughan Williams** cited another case, which is ***Lagos v. Grunwaldt (1910) 1 K.B 41.*** That case was too, decided under Order 14. In that case, the plaintiff, who had acted as the legal representative of the defendants during litigation in South America, sent in his bill of costs to their solicitors in England, and afterwards issues a specially indorsed writ against them, claiming the professional charges and disbursements. An application for leave to sign judgment under Order XIV was supported by an affidavit made by a member of the English firm of solicitors who represented the plaintiff. This affidavit was sworn in London, and the deponent stated that he was a member of the firm of solicitors acting for the plaintiff; that the defendants were justly truly indebted to the plaintiff in the sum claimed in the writ for professional charges; gave the history of the case; and added that it was within his own knowledge that the debt was incurred and was till owing, such knowledge being obtained from correspondence received from the plaintiff and from correspondence and conversations

the deponent had had with the defendant's solicitors and that he was duly authorized by the plaintiff to make the affidavit. The Court of Appeal unanimously held that;

> *There was a liquidated demand, but that the affidavit was irregular, in as much as the deponent was not a person who could swear positively to the facts and verify the cause of action and the amount claimed within Order XIV, r.1, and his affidavit was only made on information and belief. The conditions imposed by the rule were not fulfilled, and the Court had no jurisdiction to make an order under Order XIV.*

16. In the above case, the deponent had clearly averred in the disputed affidavit and stated that, he was duly authorized by the plaintiff to make the said affidavit. However, the court still went on to examine whether the deponent could have positively sworn to the facts. **Cozens-Hardy M.R** said at pages 46 and 47 that;

> *He says, "I verily believe that there is no defence to this action," and then, "It is within my own knowledge that the said debt was incurred and is still due and owing, such knowledge being obtained from correspondence received from the plaintiff and also from correspondence and conversations I have had with Messers. Pritchard, Englefield & Co. I am duly authorized by the plaintiff to make this affidavit." In my opinion it is impossible to say that this is an affidavit made by a person who can swear positively to the facts. It is obviously nothing more than a statement made on his information and belief, that information being derived from his own client, the plaintiff, who tells him this is due – and that obviously will not be enough to enable him to make the affidavit – and from further statements made by Pritchard, Englefield & Co., who, beyond all doubt, were not the solicitors for the defendant Grunwaldt at the time when those statements were made. Is it possible that the deponent can swear positively to the facts as to the stamped paper for forty-three documents, which is the first item in the bill which is given here? Is it possible that he can swear this sum was paid? I might go through all the items. Is it possible that he can swear that the fees charged by Dr. Lagos and another attorney, amounting to 1,500l in all, were due? It seems to me we should be giving an irrational and improper extension to Order XIV, r.1, if we said that such an affidavit as that, made in aid of the plaintiff, was sufficient to bring his claim within the peculiar provisions of Order XIV. In my opinion on that ground there was no jurisdiction under Order XIV, to make the order which was made. We might as well say that the plaintiff's solicitor in every case could make an affidavit to satisfy Order*

XIV, and that would be dangerous beyond anything. There may be cases (I do not wish to be misunderstood on this point) in which the plaintiff's solicitor or the plaintiff's solicitor's clerk may be perfectly competent to make an affidavit satisfying the conditions of Order XIV, r.1. There are no conditions here which justify us in saying that the plaintiff's solicitor could make the affidavit and swear positively to the facts, and swear positively verifying the amount claimed.(Emphasis added)

17. It follows from the above decision that, the authority to swear an affidavit should be required only in those circumstances exempted by the Order 41 rule 5, and the authority alone cannot make an affidavit admissible, but the court is still under duty to examine, whether the deponent can positively swear to the facts contained in the affidavits. A deponent can be disqualified from positively swearing to the facts, even though he she was authorized to do so, as described by the above decision. This view was taken in the Fiji Court of Appeal by Hickie JA in ***Pacific Agencies (Fiji) Ltd v Spurling [2008] FJCA 49; Civil Appeal Miscellaneous 10 of 2008S (22 August 2008)*** in relation to two affidavits filed in that case. Though, the Supreme Court, in the same case (***Pacific Agencies (Fiji) Ltd v Spurling [2008] FJSC 27; CBV0007.2008S*** decided on 17 October 2008) had some concerns on the view of Hickie JA in relation to the sole knowledge of solicitors and swearing affidavits by the solicitors as stated by Hickie JA, it did not reverse the rationale that, the deponent should be able of his own knowledge to prove facts (see: both the judgment of Hickie JA in Court of Appeal and the judgment of Supreme Court as cited above).

18. From the above analysis, I am fortified in my view that, the authority to swear an affidavit, on behalf of the parties to an action, should not be required except in those circumstance where the rule specifically requires the parties to swear an affidavit, and the main factor, in deciding the admissibility of an affidavit, is whether the deponent is able of his own knowledge to prove the facts contained in a particular affidavit or whether the deponent can positively swear to those facts. The affidavit, which is equated to oral evidence given in court, may contain other facts and information and even the hearsay. Hence, like the court analyses the oral evidence in court, the affidavit too should be analyzed, and the court should consider which averments to be accepted, which to be rejected, and what weight should be given to that affidavit, bearing in mind the fact that, the averments in the said affidavit is not tested by cross examination. Without this judicial exercise, a court cannot declare an affidavit as irregular and reject, merely on the basis that, it lacks the authority from the actual party to the action.

19. In the case before me, the affidavit was sworn by the law clerk of the solicitors for the defendants. The said affidavit contains the facts as to how the matter was initiated, the steps taken by both parties and the failure of the defendants' solicitors to appear on two consecutive days when the matter was called in the court etc. In fact, these are facts that, the said law clerk can positively swear and able of his or her own knowledge to prove. Furthermore, this affidavit is not the one, which is falling under the exceptions as provided by Order 41 rule 5. Therefore, I overrule the objection of the plaintiff and accept the said supporting affidavit sworn by the law clerk of the solicitors for the defendants.

20. I now turn to discuss the other question that, whether this court has jurisdiction to strike out a defence and counter claim on a *mention* date for non-appearance of the defendants or their solicitors. At this point, some obvious, but necessary points should be made. Firstly, the High Court Rules, to my understanding, only allow to strike out the defence in Order 24 rule 16 (1) (b), for failing to comply with the discovery order of the court. The said rule provides for a stiff punishment of striking out the defence for the reason that, it is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. Even the Magistrate's Court Rule (Order XXXIV) provides for the stiff punishment for disobeying court's order. Apart from that Order 24 rule 16 (1) (b), there is no other rule which allows the court to strike out a defence for non-appearance of the defendant. Obviously, striking out a defence will result in more drastic and harsh consequences on the defendant. Hence, that power should, specifically, be provided by the rules, and in the absence of express rule, the court does not have jurisdiction to do so. Secondly, even the defendant is absent, when a trial of an action is called on, the judge has no jurisdiction to strike out the defence, but he or she may proceed with the trial of the action or any counter claim in the absence of that party as per Order 35 rule 1 (2). The inevitable question that arises here is that, how the court can strike out a defence and counter claim for non-appearance on *mention* dates, if the court lacks the jurisdiction to strike out the same for non-appearance on a trial date?

21. Thirdly, it is well settled that, an action cannot be struck out solely on the ground of non-appearance of the plaintiff. In ***Prasad v Rup Investment Ltd [2012] FJHC 1396; HBC 182.2006 (19 October 2012)*** Pradeep Hettiarachchi, J observed that:

> *'When the matter was called before the Master on 20.9.2010, the Master could and should have set a time frame to have pre-trial conference since the plaintiffs had commenced their action by way of Writ of Summons. Therefore, it is my considered view that the Master should not have struck*

out the plaintiffs' action solely on the ground solely on the ground of non-appearance.(Emphasis added).

22. The above decision was followed and endorsed in ***Singh v Singh [2015] FJHC 514; HBC53.2015 (13 July 2015)***, by Ajmeer J. when hearing an appeal against the decision of the Master striking out the action of the plaintiff. The analogy supports that, if the plaintiff's action cannot be struck out for non-appearance, the defendant's defence and counter claim too, cannot be struck out for non-appearance.

23. Fourthly, the Order 25 rule 9 provides that, if no step has been taken in any cause or matter for six months then, any party on application or the court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want or prosecution or as an abuse of the process of the court. This rule applies for the both the plaintiff and the defendant in so far his counter claim is concerned. Under this rule, the court should require the parties to show cause why the cause or matter should not be struck out. It does not have jurisdiction to automatically strike out any matter or cause for the inaction for more than six months. Then, the question arises as to how the court can strike out the defence and counter claim of the defendant, on a *mention* date, for non-appearance, if it does not have jurisdiction to strike out a matter without holding a hearing, even though such party has been inactive for more than six months?

24. It follows from the above reasoning that, the court does not have any jurisdiction to strike out a defence and counter claim for non-appearance of the defendant and or his solicitors. At this point, one might ask what is the step to be taken by the court if the defendant does not appear after filling the defence? The option is to refer the matter to a judge to set a trial date and the judge will deal the matter in accordance with the provisions of Order 35 rule 1, if the defendant does not appear on the day of trial. The whole structure of the rules provides that, once a claim and a defence is filed it must be heard by the court, unless and until they are dealt with in accordance with the express provisions of the rules.

25. For the above reasons, I am of the view that, the order dated 16.09.2016 striking out the defence and counter claim of the defendants for non-appearance was made *per incuriam*. Lord Greene, M.R. in ***Young v. Bristol Aeroplane Co. Ltd.*** **[1944] 2 All ER 293** held at page 300 that, the Court was not bound to follow a decision of its own if it were satisfied that the decision was given *per incuriam*.

26. The Privy Council when the hearing the appeal from the Supreme Court of Hong Kong in ***Rodger v. Comptoir D'Escompte De Paris (1871) LR 3 PC 465 at 475; [1870-71] VII Moore N.S. 314*** observed at page 328 that;

> *One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.*

27. Accordingly, the act of the court in this case should not cause injury to the defendant and the order striking out the defence and counter claim of the defendants should be reversed. However, the other side of the matter, which is the suffering of the plaintiff through the wasted appearance, due to the non-appearance of the defendants too, should not be forgotten. Therefore, there should be a reasonable compensation for the plaintiff by way of costs. In fact, the counsel for the defendants too, admitted that, this matter could be settled through the cost.

28. Even I am mistaken in my view that, this court has no jurisdiction to strike out the defence as it happened in this case, the plaintiff, given the nature of the claim, could not routinely entered the default judgment in this case. He should have obtained the leave of the court by way of summons under Order 13 rule 6 and entered the judgment against the defendants, presuming that, there was no defence. However, the plaintiff had routinely entered the default judgment, which is irregular. The distinctive approach in setting aside the regular and irregular jugdgments is clearly stated by **Fry L. J.** in ***Anlaby v. Praetorius*** *(1888) 20 Q.B.D. 764*. His Lordship held that:

> *"There is a strong distinction between setting aside a 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".*

29. In **O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 762 Greig J** said at 654: The authorities are plain that where a default judgment is irregularly obtained the defendant is entitled *ex debito justitiae* to a setting aside. Accordingly, if the judgment was obtained irregularly, the applicant is entitled to have it set aside *ex debito justitiae,* but, if regularly, the Court is obliged to act within the framework of the empowering provision **(see:Mishra v Car Rentals (Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985)**. Thus, the defendant, against whom an irregular

judgment was entered in default, has the right to have it set aside and the courts have no discretion to refuse to set aside.

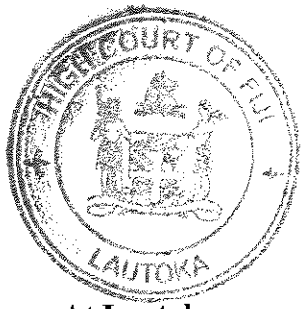
30. For the above reasons and considering all the circumstances of this case and interest of justice, I make the following orders;

a. The default judgment entered on 15.11.2016 is set aside,

b. The Statement of Defence and Counter Claim, that was struck out on 16.09.2016 is re-instated,

c. The defendants to pay a summarily assessed cost of $ 500.00 to the plaintiff within 14 days, and

d. The defendants to file and serve the Affidavit Verifying Lis of Documents within 14 days.



U.L. Mohamed Azhar
Master of High Court

At Lautoka
03/04/2018