

- [2] As appears from Scutt J's judgment the matter has a long history, commencing with a Writ of Summons issued in August 1999, with repeated delays. Many of the delays were caused by the defendants. In February 2007 the matter was fixed for a 5 day hearing on 21 – 25 May 2007 with the file listing "priority".
- [3] By summons dated 11 May 2007 the plaintiff sought leave to amend the statement of Claim. This resulted in the hearing of 21-25 May 2007 being vacated on 21 May 2007, on which day Connors J awarded indemnity costs of \$10,000 to be paid before 4 June 2007.
- [4] It is from that order that the appellants sought to appeal. However no leave to appeal had been sought by the appellants. A Notice of appeal was filed on 24 August 2007 but was struck out for failure to obtain leave.
- [5] As noted above, Scutt J gave leave to appeal out of time and leave to appeal. She also ordered that the appeal be filed and served on or before 13 February 2008.

Appeal Proceedings ABU0011 of 2008S

- [6] A Notice of Appeal dated and served on 21 February 2008 was filed on 22 February 2008 in proceedings ABU0011 of 2008S. The appellants now seek leave to proceed with their appeal notwithstanding that it was not filed in time.
- [7] The reason advanced for the late filing of this Notice of Appeal is that:
- an identical Notice of Appeal was filed in time in Appeal Proceedings 0007 of 2008S namely on 8 February 2008
 - on 12 February 2008, in accordance with Court of Appeal Rule 17, the appellant filed a Summons for Security for Costs in those proceedings, which Summons was returnable on 21 February 2008

- on 21 February 2008, there being no appearance by the appellant, the Chief Registrar struck the Summons out and dismissed/closed the case in those appeal proceedings

[8] The power to extend time to appeal beyond that limited by Statute or the Court is a discretionary power which must be exercised according to established principles and the burden lies on the applicant to satisfy the Court that in the circumstances of the case justice requires that they be given the opportunity to attack the order despite the fact of the delay: see for example **Bahadur Ali & Ors v Ilaitia Boilu & Ors** Civ App ABU 30/02, 5 September 2002 per Reddy P.

[9] The appellants have failed to discharge this burden

[10] In reaching this decision the Court consider the reasons advanced for the failure to file in time insufficient. There is no explanation of the failure to appear on 21 February 2008. The Court also takes into account the subject matter of this appeal, a \$10,000 costs order, and the 2007 failures by the appellants namely the failure to seek leave to appeal and, even if leave hadn't been required, the failure to lodge an appeal until 3 months after the order appealed from.

[11] Leave to file and serve the Notice of Appeal outside the time limited by Scutt J, is refused. Proceedings ABU0011/08 are dismissed. The appellants are to pay the respondent's costs which the Court fixes at \$500.

Appeal Proceedings ABU0007 of 2008S

[12] An issue raised by the Court was whether the Chief Registrar has the power to strike out, dismiss or close appeals and on 10 April 2008 I directed the parties to file and serve written submissions on this narrow point and stood the matter over today.

[13] The Summons for Security for Costs filed by the appellant begins:

"LET all parties concerned attend before the Registrar in Chambers at the Fiji Court of Appeal at SUVA on Thursday the 21st day of February 2008 at 11 o'clock in the forenoon or so soon thereafter as Counsel can be heard on the hearing of an application on behalf of the abovenamed Appellants ..".

[14] The appellants did not appear on 21st February 2008 or make any application for an adjournment or advise the Registrar that their counsel would be unable to attend.

[15] There being no appearance by the appellant or its counsel on 21 February 2008 the Registrar ordered *"Security for cost Summons struck out, case dismissed closed. Cost for this appearance today to the 2nd Respondent in the sum of \$200.00 to be paid in 21 days."*

[16] The appellant in written submissions dated 10 April 2008, on the question of whether the Registrar has power to strike out or dismiss or close cases, referred to the following sections of the Court of Appeal Act ("the Act"):

- Section 4: *"All applications, including applications for leave to appeal, and for an extension of time within which to file an appeal or to apply to appeal, shall ordinarily be filed with the Registrar at the Supreme Court Registry, Suva."*
- Section 8: *"The Chief Registrar of the Supreme Court (now High Court) shall be Registrar of the Court of Appeal."*
- Section 9: *"The Chief Registrar has powers to administer oaths, and may perform such other functions as are assigned to the Chief Registrar by or under this Act or any other law or by the Rules of Court .."*

[17] The appellant in its written submissions referred to Rule 10 of the Court of Appeal Rules which provides that a party aggrieved with anything done by the Registrar other than anything ordered or done under the direction of the President, may apply to have the act, order or ruling complained of set aside to a judge of the Court of

Appeal. Such application is to be made by notice of motion supported by affidavit. The appellant also referred to Order 59 rules 2 & 4 of the High Court Rules which deal with jurisdiction conferred on the Master.

[18] The respondent refers the Court to section 20(1)(g) of the Act which provides that a judge of the Court may dismiss an appeal for want of prosecution or for other causes specified in the Rules. However the respondent is unable to find anything in the Act or Rules that empowers the Registrar to dismiss or close appeal cases.

[19] However the respondent draws attention to Rule 17 of the Court of Appeal Rules.

[18] Rule 17(1) provides that an appellant must within 7 days after service of the notice of appeal apply to the Registrar to fix the amount of the security to be given by the appellant for prosecution of the appeal, and (b) *“within such time as the Registrar directs, being not less than 14 days and not more than 28 days”*, deposit with the Registrar the sum fixed as security for costs.

[20] Rule 17(2) provides:

“If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of:

(a) In the case of an appeal from an interlocutory order – 21 days; or

(b) In any other case – 42 days,

calculated from the date the appeal is deemed to be abandoned.”

[21] Rule 17(3) provides:

“Except with leave of the Court of Appeal, no appeal may be filed after expiration of the time specified in paragraph (2).”

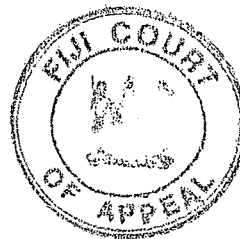
- [22] The Notice of Appeal filed on 8 February 2008 was served on 11 February 2008.
- [23] It is clear that the Court has posed for itself a false question. The Registrar has no power to dismiss appeals but the Appeal has been deemed abandoned by Rule 17(2) for failure to comply with Rule 17(1)(b). The Registrar has merely closed the file as a consequence of deemed abandonment and the words "dismiss" are of no effect and consequence.
- [24] It might be argued that where an appellant files a Summons within the time limited by Rule 17(1)(a) and then fails to appear at the return of the Summons, the appellant can never be in breach of Rule 17(1)(b) because the Registrar has not been able to make an order for payment of security of costs. However that construction would lead to an absurd result and the better view is that Rule 17(1) is not complied with if an appellant fails to appear at the return of the Summons.
- (25) The appellants were, by virtue of Rule 17(3), able to file a further Notice of Appeal but that Notice of Appeal is outside the time specified by Scutt J.
- (26) This might appear at first blush to work a harsh result for the appellants but not when considered in light of the matters set out in paragraph 10 of this judgment. Having been granted an indulgence by Scutt J, it was incumbent upon the appellants to strictly comply with the Rules of the Court in mounting the appeal. The appellants have no-one to blame but themselves for the position they now find themselves in.
- [27] Thus there is therefore nothing for this Court to do in relation to Court of Appeal proceedings ABU0007 of 2008. They were deemed abandoned by operation of the Court of Appeal Rules.

High Court Civil Action HBC 319 of 1999L

[28] Scutt J ordered that the costs of the application before her were to be determined at the time of the appeal or otherwise in accordance with the directions or orders of the Court of Appeal. There will now be no appeal because of the appellants' failure to comply with the orders of the Court. The appellants must pay the respondents' costs of that application.

Orders of the Court:

- [29]
1. In HBC 319 of 1999L the appellants are to pay the respondent's costs of the proceedings before Scutt J as agreed or taxed
 2. In ABU0011 of 2008 the proceedings are dismissed and the appellants are ordered to pay the respondents costs which I fix at \$500.00



Randall Powell

Randall Powell
JUSTICE OF APPEAL

Solicitors:

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Krishna & Company, Lautoka for the Respondents