

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU0003 OF 2008  
[HIGH COURT SUVA JUDICIAL  
REVIEW NO. HBJ 3 of 2007]

**BETWEEN :** PUBLIC SERVICE COMMISSION *First Appellant*  
:  
:  
ATTORNEY GENERAL OF FIJI *Second Appellant*  
**AND :** FIJIAN TEACHERS' ASSOCIATION *First Respondent*  
:  
FIJI PUBLIC SERVICE ASSOCIATION *Second Respondent*  
**Coram :** The Hon. Justice Devendra Pathik  
Judge of Appeal  
**Counsel :** Mr. S. Sharma with Ms. M. Rakuita for the Appellants  
Mr. S. Banuve for the 1<sup>st</sup> Respondent  
Mr. H. Nagin for the 2<sup>nd</sup> Respondent  
**Date of Hearing:** 27 August 2008  
**Date of Decision:** 26 September 2008

---

**Decision**  
**(Whether appeal deemed to be abandoned**  
**- application of s.17(2) of Court Appeal Rules)**

---

- [1] This is an application by Mr. H. Nagin, the learned Counsel for Fiji **Public Service Association** (hereinafter referred to as the 2<sup>nd</sup> Respondent – R2) that the Appeal filed herein should be **deemed to be abandoned** for the reason that the appellants have not complied with **Rule 17** of the Court of Appeal Rules.

[2] The said **Rule 17** provides as follows:-

- (1) *“17(1) The appellant must –*
- (a) *within 7 days after service of the notice of appeal –*
    - (i) *file a copy endorsed with a certificate of the date the notice was served; and*
    - (ii) *apply to the Registrar to fix the amount of the security to be given by the appellant for the prosecution of the appeal, and or the payment of all such costs as may be ordered to be paid;*
  - (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.*
- (2) *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.*
- (3) *Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2)”.*

### **First Respondent’s contention**

[3] As far as the **Fijian Teachers Association** (hereinafter referred to as the **1<sup>st</sup> Respondent – R1**) is concerned, although Notice of Appeal was properly served on it, the R1 has joined forces with R2 stating that the appeal is deemed abandoned as against itself as well.

- [4] It is R1's argument that under **Rule 15(4)** the Notice of Appeal "*shall .... be served ... upon all parties to the proceedings*". The said **Rule 15(4)** provides:-

**"A notice of appeal shall, in addition to being filed in the Court of Appeal, be served upon the Chief Registrar of the High Court and upon all parties to the proceedings in the Court below who are directly affected by the appeal ....."** [emphasis added].

- [5] The R1 submits that service on R2 was not effected in accordance with the said Rule. It says that Rule 16 should be read in conjunction with Rule 15, namely, that notice of appeal ought to have been served on **all** the parties within 6 weeks. That period expired on 8 February 2008. The R2 was served with the Notice of Appeal after the expiry date as a consequence the appellants failed to comply with the Rules of the Court of Appeal.
- [6] On the above grounds the R1 submits that the appeal is deemed abandoned altogether, against itself as well.

### **Second Respondent's Argument**

- [7] The R2 submits that not only was the appellants' Notice of Appeal dated 9 January 2008 not served on R2 in accordance with the Rules, but the appellants went ahead and applied for security for costs to be fixed without service on R2. The hearing was done in the absence of R2.
- [8] It was only when counsel drew the appellants' attention that there was no service of the Notice of Appeal that R2 was served with one on **27 March 2008**.

- [9] Thereafter Mr. Nagin had on 7 April 2008 informed the Registrar, Court of Appeal that the appellants had not complied with the said Rule 17 and the appeal should be deemed to be abandoned.

### **Consideration of the application**

- [10] It is important that I state the chronology of events. This has been well covered by Ms. Rakuita and Mr. S. Sharma in their written submission. It is as follows:

*"1.2. This was initially an application for Judicial Review only by the 1<sup>st</sup> Respondent (FTA) against the PSC for the imposition of a reduced retirement age on civil servants. The judicial review application was filed on 15 March 2007. FPSA (the 2<sup>nd</sup> respondent herein and applicant in this deeming application) applied for and was joined as a party on 20 July 2007, 4 months after the application for judicial review was first made.*

*1.3 The Judgment of the High Court was delivered on 20 December 2007; the Order was sealed on 27 December 2007 and the Notice of Appeal was filed on 9 January 2008. The 1<sup>st</sup> Respondent was served with the Notice of Appeal on 9 January 2008 but the 2<sup>nd</sup> Respondent was not served until 27 March 2008."*

- [11] Under the Rules service of Notice of Appeal has to be effected '*upon all parties who are directly, affected by the appeal*' [Rule 15(4)].
- [12] The R1 was served in time but not R2 within the time stipulated under the Rules. Hence the appellants are out of time to appeal as far as R2 is concerned. There is nothing to prevent the appellants from proceeding with the appeal against R1.
- [13] The R1 has jumped on the band waggon seeing that Mr. Nagin has raised objection. The only ground, as I see it, is that not 'all' parties were served.

Here there is only one other party, namely, R2 which should have been served in time but this was not done.

[14] I see no merit in R1's submission in opposing the appeal as far as it is concerned.

[15] Now I have to consider whether there have been breaches of the provisions of Rule 15(4) and **Rule 17** or not.

[16] It is not in dispute that there has been a breach of the said Rules. The consequence is that the appeal is "deemed to be abandoned" [R17(2)].

[17] As Mr. Nagin submits the appeal is deemed to be abandoned on 17 January, 2008 for non-compliance with the above Rules. Under Rule 17(2) the appellants are out of time to file 'fresh notice of appeal' as it allows for a fresh appeal to be filed within 42 days calculated from the date on which the appeal is deemed to be abandoned.

[18] **Rule 17(3)** goes on to say that:

**"Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2)."**  
(emphasis added).

[19] **Rule 17(3)** is applicable here. Hence **leave** of the Court of Appeal will be necessary as "**no appeal may be filed after the expiration of time specified in paragraph (2)**"

[20] The present response by the appellants to R2's application is not an application for leave as required by Rule 17(3).

[21] The appellants argue as though this is an application by them for extension of time. There are many decisions of Courts in relation to disobedience of Rules of Court.

[22] As stated in **Ratnam v Cumarasamy & Another** [1964] 3 All E R 933 at 935 it is stated that '**the rules of Court must, prima facie, be obeyed**'.

[23] The words "*deemed to be abandoned*" mean what they say. They do not have any technical meaning. If all our laws are written in such simple terms we will not have difficulty in interpretation.

[24] (a) There are very good reasons for having such Rules couched in such simple words and terms. This is particularly so in the context of appeals as in this case.

(b) On the meaning of the word "**deemed**", **Lord Radcliffe** in **St. Anbyn (L.M.) v A.G. (No.2)** [1952] A.C. 15 said:-

"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

(c) On the use of the word "**deemed**", **Windener J** in **Hunter Douglas Australia Pty v Perma Blinds** (1970) 44 A.L.J.R 257 said:

"Deemed", as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem

means simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which some matter or things has the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an indisputable conclusion."

- (d) The following passage from the judgment of James L.J. in *Ex p. Walton* 17 Ch.D 756 is also pertinent:-

*"When a statute enacts that something should be 'deemed' to have been done which, in fact and truth, was not done, that court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to" (per James L.J., Ex p. Walton, 17 Ch.D.756); and, therefore, where s.23 of the Bankruptcy Act 1869 (c.71), provided that on disclaimer in bankruptcy of an onerous lease it should "be deemed to have been surrendered", the meaning was that such "deemed surrender" was only operative as between the lessor and the bankrupt and his estate, without prejudice to the lessor's rights against any other person under or by virtue of the lease (ibid.). See Bankruptcy Act 1914 (c.59), s.54.*

- [25] The Court of Appeal has very comprehensively dealt with the meaning and purport behind Rule 17 in the case of *Ports Authority of Fiji v C & T Marketing Limited* [2001] FJCA ABU0004 of 2001. Since the following passage from the judgment of the Court is so pertinent to this case that I ought to set it out in full:-

*"Even if the Appellant was filing its second appeal on 29<sup>th</sup> January 2001, the Registry was therefore right to reject the new notice of appeal, not because it was filing too many appeals, but because the appeal was deemed to be abandoned – 28 days after the certification of the record. Thereafter the Appellant would have had 42 days to file a fresh notice of appeal. After the lapse of the 42 day period, a new notice of appeal could only have been filed with the leave of the Court of Appeal.*

*This application is not one for leave to appeal out of time, so this matter can rest here, whilst the Appellant decides on its next course. However, for the guidance of the court staff, and for legal practitioners, it is important to consider the purpose of Rules 17 and 18 of the Court of Appeal Rules. In particular, can an Appellant who fails to follow the procedural steps laid out in Rules 17 and 18, continue to have the right to file fresh notices of appeal and infinitum? Is the right to file a fresh appeal limited to one notice, as the Deputy Registrar found?*

*Although as counsel for the Applicant argued, rules usually mean what they say, it is also helpful to look at the Rules together, and to interpret them in a purposive way. The Court of Appeal (Amendment) Rules made significant changes to the rules of the Court. They placed the responsibility for the preparation of the record on the appellant, and they imposed a strict timetable for the preparation of the record, the payment of security for costs, and the lodging and serving of documents at the Registry and on the Respondents. The purpose of the Rules, was obviously to expedite the appellate process and to make it more efficient. The provision that failure to follow the rules, leads to an automatic abandonment of the appeal, is intended to operate as a sanction against delay. If the rules are not followed, the Appellant loses his right to appeal. Reinstatement of the appeal has a timetable, and it is only with the leave of the Court that reinstatement after the time limit, is permitted.*

*To allow appellants to file appeal after appeal, for failure to follow the statutory steps, and to allow the appellant, either inadvertently or deliberately, to delay the appellate process for months or years, would clearly violate the purpose of the Rules.*

*In Ponsami v Dharam Lingam Reddy Civil appeal No. CBU001 of 1996, the Supreme Court said as much in respect of the Supreme Court Rules, referring to its earlier decision in Venkatamma v Ferrier-Watson Civil appeal No. CBU0002/92. Non-compliance with the rules of the court may be fatal to an appeal, especially in the absence of any special circumstances.*

*For these reasons, the Deputy Registrar was correct in finding that the right to file a fresh notice of appeal under Rule 17(2) is limited to one fresh notice. In future, thereafter, an appellant must make an application to file an appeal out of time, with the leave of the Court of Appeal under Rule 17(3)". (emphasis added)*



[26] Also in **Rupeni Silimuana Momoivalu v Telecom Fiji Limited** (ABU0037 of 2006) the Court of Appeal summed up the position as in this case as follows:-

*“Here the appellant failed to comply with the Court of Appeal Rules. His appeal was deemed abandoned for non-compliance with Rule 17(1) followed by failure to comply with Rule 17(2). Then under R17(3) he could not proceed without leave of the Court of Appeal.”*

[27] In this case the appellants when asked by court as to why service was not effected when it should have been under the Rules, they had no answer. The Court could not ascertain whether there was a good or bad motive in their failure to serve. They have not evidently come with clean hands.

[28] It is this very kind of situation that the Rules are there in terms of Rule 17.

[29] As the appellants say, there is no doubt that the appeal against R1 is ‘still on foot’ and that the grounds of appeal will be determined without the involvement of R2.

[30] The appellants say that the Court of Appeal Rules give the Court the power to waive non-compliance with the Rules ‘whether that non-compliance is not wilful’. **Rule 64** to which counsel referred to in this regard is not applicable here. With the appellants not disclosing the reason for non-service is a good enough ground for regarding the appeal as deemed to be abandoned as against R2. They admit that the issue in this case can still be determined without the involvement of R2.

[31] This is not a case where the Court can exercise its discretion to entertain the appeal as far as R2 is concerned. If this is not a deemed abandonment of appeal then what is it? The question of whether R2 suffered any ‘prejudice’ does not arise to be considered vis a vis the appellants.

[32] However, if the appeal proceeds against R1, as it must, R2 will not be able to put forward its case for Court's determination. That is R2's problem for it to solve for itself. The appellants have not stopped it from being a party to the appeal although service was effected belatedly and there is still time to prepare for the appeal in the October-November Session of the Court of Appeal. I believe the Appeal Records are ready.

[33] But, although there are two Respondents, the **issue** on the appeal as I see it is **the same** in respect of each of the Respondents. Hence whatever decision is reached could also affect R2 on the issue adversely or otherwise depending on the decision. The R2 was joined as an interested party at a later stage in the judicial review proceedings as already stated hereabove.

### **Conclusion**

[34] For the above reasons I hold that as against the second respondent (R2) the **appeal is deemed to be abandoned.**

[35] The first respondent's (R1's) argument that the whole appeal i.e. against both respondents is deemed to be abandoned is dismissed as being without merit.

[36] There is no reason why the appeal against the first respondent (R1) should not proceed without R2 taking part in the proceedings.

[37] It is not the appellants who are objecting to R2 being a party to the appeal and taking full part in the bearing of the appeal, but R2 itself which does not want to for the reasons it has given.

**Order**

1. **I hold** that the second respondent succeeds in its application that the appeal against it is “deemed to be abandoned” under Rule 17 of the Court of Appeal Rules.
2. **I further hold** that the first respondent’s application that the appeal is ‘deemed to be abandoned’ altogether on the ground particularly that service of Notice of Appeal was not served on **all** parties to the action, is dismissed as being without merit.
3. **It is ordered** that the Appeal by the Appellants proceed to hearing in the October-November Session of the Court of Appeal as the Record of Appeal it is understood is ready and that the Appeal Court is in a position to hear the appeal in the said Session.
4. In all the circumstances of this case I order that each party bear its own costs.



**D. Pathik**  
**Judge of Appeal**

**26 September 2008**