

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

**CIVIL APPEAL ABU 17 OF 2017**  
**(High Court HBC 341 of 2008)**

**BETWEEN** : **FORMSCAFF (FIJI) LIMITED**  
*Appellant*

**AND** : **RAJESH NAIDU**  
*First Respondent*

**AND** : **AMBE CONSTRUCTION LIMITED**  
*Second Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Ms E Narayan for the Appellant**  
**Ms S Dewan for the First Respondent**  
**No appearance for the Second Respondent**

**Date of Hearing** : **29 August 2018**

**Date of Ruling** : **23 October 2018**

**RULING**

- [1] The First Respondent (Naidu) commenced an action in the High Court in September 2008 claiming damages against the appellant (Formscaff) and the second respondent

(Ambe Construction) in respect of injuries that he suffered in April 2008 during the course of his employment with Ambe Construction. The trial of the action was heard by Kotigalage J. In a judgment eventually delivered by Amaratunga J on 25 November both Formscaff and Ambe Construction were found to be jointly responsible for the accident at work and were each ordered to pay 40% of the damages awarded to Naidu who was found to be 20% responsible for his own injuries by way of contributory negligence. Naidu was awarded \$125,000.00 with interest at 6% as general damages, \$67,000.00 for further care, \$68,411.20 for loss of future earnings and special damages of \$6868.44 with interest of 3%. Costs of \$6000.00 were also awarded to Naidu.


- [2] Formscaff filed a notice of appeal on 6 January 2017 which was the 42<sup>nd</sup> day after pronouncement on 25 November 2016 of the judgment in the High Court. In an affidavit of service sworn on 16 January 2017 by Cama Dausiga it is deposed that a copy of the notice of appeal was served on Naidu and Ambe Construction on 10 January 2017 which is 46 days after pronouncement of the judgment.
- [3] Rule 16 of the Court of Appeal Rules provides that every notice of appeal shall be filed and served within 6 weeks (i.e. 42 days) from the date on which the final judgment was pronounced. In this case filing was effected within time but service was effected out of time. The fact that the legal vacation fell within this period is irrelevant for the purposes of calculating time under the Court of Appeal Rules.
- [4] It follows that there was no appeal properly before the Court. It also follows that there was no right given to Formscaff to file a fresh notice of appeal under Rule 17(2) of the Rules. The only course of action available to Formscaff was to apply for an enlargement of time under Rule 27 of the Court of Appeal Rules.
- [5] Unfortunately the appeal then proceeded under Rule 17(2) by way of a second notice of appeal. There was some discussion at the hearing concerning the fate of that second notice of appeal. In view of the conclusion concerning the first notice of appeal, it is not necessary to consider that issue any further.

- [6] There is a summons filed on 28 April 2017 by Formscaff seeking an enlargement of time to file and serve a notice of appeal. However that application is stated as being made under Rule 17(3) of the Court of Appeal Rules. The summons cannot proceed under Rule 17(3) since there has never been any appeal before the Court and hence no opportunity to comply or rather fail to comply with Rule 17.
- [7] For the future conduct of this matter that summons is to be regarded as an application for an enlargement of time under Rule 27 of the Rules as at the time of filing. The application is to be heard before a single judge of the Court of Appeal on a date to be fixed. Affidavits and submissions have been filed.
- [8] I am satisfied that Ambe Construction is in breach of the requirements concerning the lodgment of an address for its registered office and that as a result any further service of process can only be effected by substituted services.

Orders:

1. *Application for enlargement of time by Formscaff under Rule 27 to be listed for hearing on a date to be fixed.*
2. *Costs incurred up to the date of this Ruling are to be costs in the application.*



  
\_\_\_\_\_  
Hon Mr Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**