

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

CIVIL APPEAL NO. ABU 20 of 2020
(Lautoka High Court No. HBC 0055 of 2010)
(Civil Appeal No: ABU 111 of 2018 [earlier deemed abandoned])

BETWEEN : **MARIA VANI MARIETA VUNISA**

Appellant

AND : 1. **EMOSI NAWAIKALOU LUTU**
2. **RAWLINSON JENKINS**
3. **NEW IDEA ASSURANCE CO.LTD**

Respondents

Coram : **Almeida Guneratne, JA**

Counsel : **Mr V Singh for the Appellant**
Ms M Fong the for 1st and 2nd Respondents
Mr S Singh for the 3rd Respondent

Date of Hearing : **24 June, 2020**

Date of Ruling : **3rd September, 2020**

RULING

[1] The Appellant by her summons sought the following Orders:-

- A. That in the event this appeal has been deemed abandoned, that it be reinstated.*
- B. That the time for filing of submissions be extended.*
- C. That the costs and incidental to this application be in the appeal.”*

- [2] The said Summons was supported by an affidavit by Rajendra Pal Chaudhary, the principal of the Appellants' firm of solicitors filed on 3 June, 2020.
- [3] There is also an affidavit of 2rd June, 2020 by one Pravin Narayan Gosai, said to be the Chief Clerk of the Appellant's solicitors who states that, he has been authorized to swear the said affidavit by the Appellant by a writing dated 29 May, 2020.

Relevant Background to this Application

- [4] The Judgment of the High Court in this case was in September, 2018. The Appellant against the whole Judgment and the 3rd Respondent against part of it have appealed.
- [5] The Appeal bore the number ABU 111/2018. It is undisputed that the copy records were certified and security for costs of the appeal were also paid. However, on the basis that written submissions were not filed in time thereafter the appeal had been "*marked abandoned*" on 3 February, 2020 as is revealed from the case file.
- [6] This appears to have been on account of paragraph 4(ii) read with paragraph 4(iv) of Practice Direction No.1 of 2018.
- [7] Before I proceed to make a determination in this matter I have borne in mind that the 1st and 2nd Respondents did not file affidavits in opposition to the application of the Appellant to re-instate the Appeal ABU 111/2018 (although the Appellant had filed a second appeal bearing No. ABU 20/2020). Only the 3rd Respondent has done so. Apart from that, while the 1st and 2nd Respondents have not tendered written submissions, the 3rd Respondent filed written submissions "*opposing re-instatement of abandoned appeal and/or extension of time to file written submissions.*"
- [8] I shall refer to the 3rd Respondent's said affidavit in opposition and submissions relative to the Appellant's affidavits and submissions after I express my views on the legal issues that

have arisen for consideration in the first instance and then see whether the 3rd Respondent's affidavit in opposition and submissions could take away from those views.

The failure on the part of the Appellant to file written submissions

[9] In a recent decision of mine in this very session I held the view that “*written submissions*” are presumably to assist Court and such failure cannot deny a party litigant the right to make oral submissions.

(*vide*: **Sun(Fiji) News Limited –v- Kewal Chand**, ABU 58/2019, 28 August, 2020)

[10] I re-iterate those views here.

On the issue of “*abandonment*” with “*no notice*”

[11] In that same case I laid down that:-

(a) *If for non-compliance with any practice directions, if an appeal is to be regarded as “abandoned,” the Registry is required to obtain Judicial sanction therefor by an Order of Court;*

(b) *Once that is done, in regard to “no notice” being required to be given, I expressed my reservations and, that Practice Direction being made by the (Hon) President by this Court (having statutory/ constitutional authority therefor), yet in view of my reservations, I said that, that is a matter for the Full Court to make a determination thereon.*

[12] In that Ruling I referred to “*the Ancient Rule*” (with its Biblical overtones) (*vide*: Wade & Forsythe, Administrative Law, 11th ed.,p.406) and the celebrated decisions in **Cooper v. Wandsworth Board of Works** (1863) and **Ridge v Baldwin** [1964] AC.40.

[13] I re-iterate all that in the context of this case as well.

[14] In the result I cannot subscribe to a view that, when an appeal is “*deemed abandoned*” that, “*no notice*” thereof need be given to “*a party affected.*” That, offends, in my view, the basic tenets of nature justice, given also the fact that, in the instant case, being “*failure to file written submissions,*” nevertheless, the appellant’s right to make oral submissions could not have been denied.

[15] I hasten to reflect on two other matters in this context.

[16] The first is, paragraph 4(iii) of Practice Direction No.1 of 2018. It states,

“The respondent is required to file and serve answering written submissions within 28 days thereafter.”

[17] Of course, it could be argued that if the Appellant failed to comply with paragraphs (i) and (ii) of the said Direction, paragraph (iii) would not arise.

[18] But what if, an appellant were to comply with (i) and (ii) and the Respondent fails in regard to (iii)? Is the Respondent to be shut out from making oral submissions?

[19] No doubt, as Clause 3 of Practice Direction No.1 of 2018 states,

“The purpose of this practice direction is to regulate the further procedure to be followed by the parties to a Civil Appeal following certification of the appeal record by the Registrar.”

[20] But, my reservation is, by such regulatory procedure could a party’s appeal be “*deemed abandoned*” without notice for failure to file written submissions after certification of the appeal record by the Registrar? (which is the issue in this case?)

The 3rd Respondent's position

- [21] In the background of what I have articulated above, I shall now look at the 3rd Respondent's affidavit in opposition to the Appellant's summons for re-instatement along with the 3rd Respondent's written submissions.
- [22] To begin with, the affidavit in opposition is in response to Pravin Narayan Gosai. It makes no reference to Rajendra Pal Chandhary's affidavit.
- [23] The main thrust of the 3rd Respondent's written submissions is on the issue that, the appeal is one that has been "*deemed to be abandoned*" on the Appellant's failure to file written submissions.
- [24] On account of that, I could not find a reason to sway from what I have said earlier. The cited cases by the 3rd Respondent no doubt, stand on their own factual content but not relevant and/or applicable to the theme I have pursued.
- [25] As against that, I was persuaded by the Appellant's submissions wherein it has been submitted that:-

"With respect there is no prejudice to the Respondents. The Third Respondent has filed Affidavits in Opposition. The Third Respondent is not prejudiced at all. The appeal is not against the Third Respondent. The Appellant's appeal is against the First and the Second Respondents.

In fact in Appeal number 111 of 2018 the Third Respondent has filed a Respondent's notice seeking costs in the High Court action which was not given to them. The First and the Second Respondents have not filed any claims against the Third Respondent in this Appeal. The First and the Second Respondent have also not filed any Affidavit in Opposition to the Appellant's Summons.

The Appellant's Solicitor has apologized to the Court for his oversight. It was an inadvertent error and there is no fault in the part of the Appellant.

It is respectfully submitted that the Appellant be allowed to file her Submissions so that at the end of the day justice is done one way or other on merits and not on a technical default.”

[26] For the aforesaid reasons I proceed to make my orders as follows:

Orders of Court

1. *The Appeal bearing No. ABU 111/2018 said to have “been abandoned” is re-instated.*
2. *The Registrar is directed to list the appeal ABU 111/2018 for hearing before the Full Court on a convenient date on the basis of the Notice/Grounds of Appeal dated 23 October, 2018 against the impugned Judgment of the High Court.*
3. *Given the fact that, the present situation has been brought about for no fault on the part of the Respondents, I make no order as to costs.*
4. *I make further order, for the reasons I have articulated in this ruling, that, should the Appellant so desire and the Respondents as well, all parties are at liberty to file written submissions on the substantive merits, prior to the date set for the hearing of the Appeal by the Registrar.*



Ida A. Guneratne

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL