

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

CIVIL APPEAL NO. ABU 58 of 2019
High Court No. HBC 32 of 2014

BETWEEN : **SUN (FIJI) NEWS LIMITED**

Appellant

AND : **KEWAL CHAND**

Respondent

Coram : **Almeida Guneratne, JA**

Counsel : **Mr E Narayan for the Appellant**
Mr G O'Driscoll for the Respondent

Date of Hearing : **22 July, 2020**

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

RULING

[1] This matter concerns an application seeking leave for re-instatement of an appeal “deemed to have been abandoned” on 2nd January, 2020.

[2] The application is contained in the summons of the Appellant which reads as follows:

“1. THAT the Appellant do have leave for reinstatement of the Notice of Appeal filed on 16th July 2019 (sic) and deemed to be abandoned on 2nd of January 2020.

2. *AND/OR IN THE ALTERNATIVE that the Appellant do have leave to file Notice of Appeal and/or extension of time for Appeal that was deemed to be abandoned for non-compliance with the Practice Directions No.1 of 2018 and No.1 of 2019 of 2nd of January 2020.*
3. *THAT consequent upon grant of such leave herein, the Appellant do have extension of time to file and serve its Written Submissions in compliance with the Practice Directions No.1 of 2018 and No.1 of 2019.*
4. *AND/OR FOR AN ORDER that all incidental and consequential directions be given in respect of the filing and hearing of the said Appeal.*

The Appellant (Original Third Defendant) intends to read and rely upon the Affidavit of PETER LOMAS duly sworn and filed herein.

This application is made pursuant to Rule 17(3) of the Court of Appeal Rules and Section 20(1) of the Court of Appeal Act (Cap 12) and pursuant to the inherent Jurisdiction of this Honourable Court.”

- [3] The said summons is supported by an affidavit of one Peter Lomas, who claimed to be duly authorized to do so by the Appellant (which is a Company).
- [4] The Respondent opted not to file an affidavit in opposition. At the hearing before me, learned Counsel for the Respondent took the stand that, he was not filing any written submissions in response to the written submissions tendered on behalf of the Appellant in seeking to have the appeal “*deemed to have been abandoned*” re-instated, carrying the trappings of a contention which appeared to me as saying that there was no case for the Respondent to meet and that, he was relying on the legal impact in the Appellant’s failure to comply with the Practice Directions No.1 of 2018 and No.1 of 2019.
- [5] In the result, I had before me only the Appellant’s summons for re-instatement of the Appeal supported by the said affidavit of Peter Lomas (referred to above) and the Appellant’s written submissions and the oral submissions of respective Counsel.

Consideration of the Affidavit of Peter Lomas

[6] In paragraph 10 of that affidavit it is admitted the written submissions were not filed as required by Practice Direction No.1 of 2018 and No.1 of 2019, although an effort was made to make a spin on the computation of time limits but nevertheless conceding at paragraph 15 that “*the time limit had expired _ _ _*” yet taking refuge in paragraph 16 in saying that,

“the Appellants solicitors during the pandemic and the resulting lockdown period had overlooked the time period required for filing its written submissions in the matter and this was a genuine mistake on the part of the Appellant.”

[7] I must say at this point that, that argument finds support in the Supreme Court judgment in **Fiji Industries Ltd v. National Union of Factory and Commercial Workers**, CBV 008 of 2016, 27 October 2017.

[8] In that judgment (in effect) it was laid down as a proposition that lawyers mistakes should not visit upon party litigants (per His Lordship, Justice Keith).

[9] Bearing that proposition in mind, I proceed to look at the relevant practice directions pertaining to the filing of written submissions.

“Practice Direction No. 1 of 2018

General

1. *Rules 16 – 18 of the Court of Appeal Rules (the Rules) regulate the procedure to be followed in civil appeals up to and including the certification of the appeal record by the Registrar.*

2. *Rule 18(8) of the Rules requires the appellant within 28 days of certification of the record to:*

- (i) Notify all parties to the appeal that the record is ready for collection from the appellant, and*
- (ii) Lodge 4 copies of the record with the Registrar.*

3. *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.*

Written submissions

4. *The following procedure is to apply in any civil appeal where the appeal record has been certified after 1 July 2018.*

(i) *In order to comply with Rule 18(8) the Appellant is required to collect the certified appeal record from the Registry within 14 days of certification of the record.*

(ii) *Within 28 days thereafter (i.e. no later than 6 weeks after certification of the record by the Registrar) the Appellant is required to file and serve written submissions.*

(iii) *The respondent is required to file and serve answering written submissions within 28 days thereafter.*

(iv) *In the event of non-compliance with either paragraph (i) above or paragraph (ii) above, then paragraphs (2) and (3) of Rule 17 of the Rules apply as if the non-compliance were non-compliance with sub-rule(1) of that Rule.*

(v) *Written submissions should refer to both the authorised report/unreported citation and the neutral (internet) citation. Copies of the reported or unreported signed version of authorities should be provided in preference to the internet version.*

Call-over

5. *When the appeal record has been certified by the Registrar the appeal will be placed in the list of appeals to be called over.*

6. *Appeals will be called over in order generally determined by the date on which the notice of appeal (or leave application) was filed and served. The number of appeals to be called over will usually be more than the number of appeals that can be listed in the next session. This is to ensure that there is a full list of civil appeals to be heard in the session.*

7. *A call-over is usually held approximately six(6) weeks before the next session and parties are usually given notice of the call-over approximately 10 – 14 days beforehand.*

8. *When an appeal is listed for call-over parties are expected to take a date for the hearing of the appeal in the next session. The call-over notice will inform the parties of the period when appeals will be heard in the next session. Only in exceptional circumstances and with supporting material will a party's application to be relisted in the following call-over be entertained."*

Rule 17 of the Court of Appeal Rules (Cap 12)

“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.”

Practice Direction No.1 of 2019

[10] “ABANDONMENT

7. *In the event of non-compliance with paragraphs 2, 5 and 6 then paragraphs (2) and (3) of Rule 17 of the Rules apply as if the non-compliance were non-compliance with paragraph (1) of Rule 17.*

8. *Abandonment is an automatic consequence of non-compliance with Practice Directions No 1 of 2018 and No 1 of 2019. Parties will not receive formal notice that the appeal is deemed to be abandoned.”*

Reflections on the said Practice Directions and the Rules of Court incorporated into the said directions in the light of legal principles

[11] Two issues arise for reflection and consideration in that regard. First, the issue in regard to the failure of the Appellant to file written submissions. Secondly, the issue relating to “*abandonment*.” I shall take the said issues seriatim as follows.

The Appellant’s failure (admittedly) to file written submissions within time

[12] Could such failure lead to the consequence of an appeal being “*abandoned*?”

[13] In my view, written submissions are to assist a Court to make a determination on a matter that is in issue. Should a party fail to make use of that benefit, nevertheless the Court is

obliged to hear oral submissions and determine whatever matter that is placed before it for otherwise it would amount to denying a party's right to be heard, which is a basic tenet of Natural Justice.

[14] Consequently, I hold the view that the failure to file written submissions, ipso facto, cannot be regarded as the Appellant having "*abandoned*" the Appeal in as much the right to be heard by way of oral submissions still remained.

[15] Although I could have rested my determination on the matter of the Appellant's failure to file written submissions as aforesaid, nevertheless, I felt it was not inappropriate to address the issue on "*abandonment*" as well in as much as the practice directions have brought into their fold the Rules of Court (viz: Rule 17) as well.

On the issue of "*abandonment*"

[16] I have earlier referred to the clauses contained in the relevant Practice Direction in that regard (supra, paragraph [10])

Automatic consequence?

[17] Who makes that decision that "*an appeal is deemed to have been abandoned?*"

[18] Could it and should that decision be left in the hands of the Registrar (who is an "*Administrative Statutory functionary*") for which reason, the relevant file ought to be placed before a Judge of Appeal for Judicial sanction? I think that is an imperative requirement for which I think I have sufficient jurisdiction to say under the provisions of Section 20(1) of the Court of Appeal Act, and in which regard I lay down as a proposition that, hereafter the Registrar must act as such.

[19] To begin with, a party must be informed as to the status of his expectant right as to appeal, even if a judge sanctions the Registrar's observations as to "*non-compliance*" in any matter.

That Ancient Rule

- [20] I am reminded of what God is supposed to have said to Adam when he had consumed a fruit from the forbidden tree, yet, willing to hear as to what Adam had to say. (see: Wade and Forsyth Administrative Law (11th ed.), p.406.
- [21] The learned authors therein were recounting the celebrated case of **R v. University of Cambridge** (1723) which to date has been regarded as the genesis of what constitutes a fair hearing and the right of a party to such a hearing.
- [22] One hundred and forty years thereafter had come to the Judicial annals of the U.K a case where admittedly an illegal building had been constructed and yet it was held that, the builder had to be heard before demolition of the building. (see: **Cooper v. Wandsworth Board of Works** (1863) approved in the seminal decision in **Ridge v. Baldwin** (1964) AC 40.
- [23] It is to be noted here that, the present situation has arisen in the context of a failure to file written submissions to prosecute an appeal of a party litigant, thus, whether qualitatively or quantitatively, stands on a stronger footing to a person being required to be given notice before demolishing an illegally constructed building.
- [24] Consequently, in the context of Section 20(1) of the Court of Appeal Act, although I have no jurisdiction to review the said practice directions, I do not see any impediment to my jurisdiction under that Section to say as follows, which is to say, in addition to what I have said at paragraph [18] of this Ruling, hereinafter, the Registrar shall be required to give notice of abandonment of an appeal to an appellant concerned.

Determination and Conclusion

- [25] I have no power to review the Practice Directions, and therefore I leave that matter for the Full Court to make a determination.

[26] However, in the specific context of “*the filing of written submissions*” which is the direct issue that is before me, for the alleged failure for which the Appeal had been “*deemed to have been abandoned*”, on the basis of the aforesaid reasons, I accept the Appellant’s summons for re-instatement of the Appeal holding as I do, that the Appeal could not have been “*deemed to have been abandoned.*”

[27] Consequently, I proceed to grant the Order 1 and/or relief sought in the Appellant’s Summons dated 16th July, 2019 (*sic*) and Orders 3 and 4 thereof.

Orders of Court

1. *The application of the Appellant for re-instatement of the Appeal as stated in paragraph [27] above is allowed.*
2. *The Registrar is directed to list the matter of the Appeal for hearing on the substantive merits as contained in the Notice of Appeal dated 16 July, 2020 before the Full Court on a convenient date.*
3. *In as much as an interpretation of and views on the rules of the Court and practice directions concerned in arriving at this determination and conclusion were involved, I make no order as to costs.*



A handwritten signature in purple ink, which appears to read "Almeida Guneratne".

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL