

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 155 OF 2009**  
(On Appeal from Lautoka High Court  
Civil Action No. HBC 155 of 2009)

**BETWEEN** : **BRETT WHITTAKER** and **LOUISE WHITTAKER**

**APPELLANTS**  
**(ORIGINAL PLAINTIFFS)**

**AND** : **BANK OF THE SOUTH PACIFIC LIMITED**

**RESPONDENT**  
**(ORIGINAL DEFENDANT)**

**Appearances** : Mr Mark Anthony for Appellants  
Mr Nilesh Kumar for the Respondent

**Date of Hearing** : 07 March 2017.

**Date of Ruling** : 15 June 2017

## **R U L I N G**

### **Introduction**

[01] This ruling concerns a preliminary objection raised by the Respondent regarding abandonment of the appeal.

[02] The parties preferred to file written submissions limited to the preliminary issue raised by the Respondent. Accordingly, they have filed their respective submissions. After considering submissions from the parties, I proceed to deliver my ruling.

### **Background**

[03] The Respondent filed a summons seeking dismissal of the action for failure to give inspection. On 16 December 2016, the Learned Master of the High Court (“the Master”) gave a ruling (“**Ruling**”) on the Respondent’s application to strike out the Appellants’ statement of claim, where the Master ordered that:

*“(1) The Plaintiffs’ claim is struck out for failure to give inspection.*

*“(2) The Plaintiffs to pay costs of \$1500.00 (summarily assessed) to the Defendant within 14 days hereof.”*

[04] The Appellants filed their notice of appeal on 16 January 2016, and served it on 18 January 2017. The affidavit of service of the notice of appeal was filed on 10 February 2017. On 13 February 2017, the Appellants filed summons for direction and a date for the hearing of the appeal as required by Order 59 rule 17 of the High Court Rules 1988 (as amended) (“the HCR”) seeking directions on the hearing of the appeal. The summons for direction came on for the hearing on 07 March 2017 when the Respondent took up a preliminary point that the appeal is deemed abandoned.

### **The Preliminary Issue**

[05] The preliminary issue advanced by the Respondent, in effect a single point, that is that the appeal is deemed to have been abandoned for non-compliance with O 59, r. 17 (1) of the HCR.

## The Law

[06] The appeal is from the decision of the Master. Appeals from decisions of the Master are governed by O.59 of the HCR. The law apposite to the objection advanced by the Respondent is O.59, r.17 of the HCR, which provides:

*“Procedure after filing appeal (O.59. r17)*

*17.-(1) the Appellant **shall**, upon serving the notice of appeal on the party or parties to the appeal, **file an affidavit of service within 7 days** of such service.*

*(2) The Appellant **shall**, within **21 days** of the **filing** of notice of appeal, **file and serve a summons returnable before a judge** for directions and a date for the hearing of the appeal.*

*(3) **If this rule is not complied with, the appeal is deemed to have been abandoned.**” (Emphasis provided)*

[07] *In Gay v Resolution Trust Corporation* [2010] FJHC 268; BHA01, 2009 (26 February 2010) (refer Tab 1), His Lordship Calanchini J (as he then was) said at page 10 in respect of an appeal in which the Appellant failed to file and serve a summons for directions within 21 days.

*“Under Rule 17(2) the appellants were required to file and serve a summons for directions within 21 days of filing the Notice of Appeal. Since the Notice of Appeal was filed on 28<sup>th</sup> April 2009, the Summons for directions was required to be filed by 19 May 2009. It was accepted by the parties that the summons for directions was not filed until 11 June 2009.*

*Counsel for the appellants sought to give an explanation from the bar table concerning the closure of the registry following the events of early April 2009. However there was no affidavit material before me setting out any relevant facts as to how and when this affected the appellants and any attempts made to file such summons between 1 May 2009 when affidavit of service was accepted for filing and 11 June 2009 when the summons was filed.*

*The Rules in Part II of Order 59 have imposed a strict timetable for the filing and serving of documents at the Registry and on the*

*Respondents. The purpose of the Rules was obviously to avoid delay at the interlocutory stage of civil proceedings and to make such appeals more efficient. **The provision in Rule 17(3) that failure to follow Rules 17 (1) and 17 (2) leads to an automatic abandonment of the appeal is intended to operate as a deterrence in respect of delay...***

*As a result I find that the appeal is deemed to have been abandoned under Rule 17 (3) as a result of non-compliance with Rule 17 (2)...”*

*(Emphasis provided)*

[08] In *Deo v Ascot Motors Proprietary Ltd* [2011] FJHC 782; Action 331.2008 (18 November 2011), where the Plaintiff sought leave to appeal the Master’s decision made striking out the action pursuant to Order 25 Rule 9 and the Defendant sought an order that the Plaintiff’s appeal from a decision of the Master be deemed abandoned under Order 59 Rule 17 (3) of the High Court Rules, once again His Lordship Calanchini J) (as he then was) said at pages 2-4:

*“The effect of the rule [O 59, r 17] is that if the appellant does not file an affidavit within 7 days of service **or** does not file and serve a summons within 21 days of filing of his notice of appeal, he **is** deemed to have abandoned his appeal.*

*In this case the affidavit required under Order 59 Rule 17(1) was filed on 31 August 2011 and therefore was filed within the required seven days.*

*However, the summons required under Rule 17 (2) whilst filed on 14 September was not served on the Second Defendant until 26 September 2011. The summons was required to be served no later than 13 September 2011. It was as a result out of time by 13 days.*

*Rule 17 is quite clear. Under those circumstances the appeal is deemed to be abandoned. In civil litigation, abandonment is taken to mean the relinquishing of the whole or part of a claim in an action or in an appeal. The appeal is therefore deemed to have been abandoned by the appellant. There is now no longer any appeal in existence. **This***

**result is an automatic consequence that is prescribed by the rule with no second chance.**

Counsel for the Plaintiff referred the Court to an interlocutory decision in **A Mitchell Gay and Another -v- Resolution Trust Corporation and Others** (unreported civil appeal HBA 01 of 2009 delivered 26 February 2010). **During the course of that decision I made an observation, when dealing with a similar situation, that there was no explanation in the affidavit material to explain the failure to comply with Order 59 Rule 17 (2). To the extent that the comment may be taken to indicate that such an explanation, if reasonable could alleviate the consequence of non-compliance, then the comment should be disregarded as it was misleading. Whilst draconian, the consequence mandated by Rule 17 (3) for non-compliance with either Rule 17 (1) or Rule 17 (2) of Order 59 is final and absolute.**

Whether there is any jurisdiction vested in the Court to entertain an application to re-instate the appeal has not yet been decided and there is no such application presently before me. I have some doubt as to the existence of a power to re-instate an abandoned appeal.

Nor do I, in this application, find it necessary to make any comment on what may be the outcome in the event that the Plaintiff should seek to commence afresh the appeal proceedings under Order 59.

Finally, counsel for the Plaintiff urged the Court to exercise its inherent jurisdiction to extend the time for the service of the summons. **In my judgment the exercise of such a discretion is not available in circumstances when the appeal has already been abandoned and as a result of which there is no appeal on foot in respect of which a discretion could be exercised.** Furthermore there was no application to that effect before the Court.

For all of the above reasons the application by the Second Defendant is granted. I order that the appeal be deemed abandoned in accordance with Order 59 Rule 17. I do not consider that such an application was necessary as Rule 17 (3) provides for the consequences of non-compliance as a matter of course. There was no requirement for the Second Defendant to do anything further once the Plaintiff had failed to comply with Order 59 Rule 17 (2) ...” (Emphasis provided)

## **Discussion**

- [09] The appeal arises out of the decision of 16 December 2016 delivered by the Master striking out the Appellants' claim for failure to give inspection. The Appellants filed their notice of appeal on 16 January 2017, and served it on the Respondent on 18 January 2017. The affidavit of service of the notice of appeal was filed on 10 February 2017.
- [10] It will be noted that Appellants filed their affidavit of service 23 days after the service of the notice of appeal.
- [11] The Appellants did not file their summons for directions until 13 February 2017, which is 28 days after filing of the notice of appeal, and did not serve it until 14 February 2017, which is 29 days after the filing of the notice of appeal.
- [12] O.59, r.17 provides for procedures to be followed upon filing the appeal. The Appellant must, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service (see r. 17 (1)). Since the Appellants served their notice of appeal on 18 January 2017, they must have filed their affidavit of service on or before 25 January 2017. The Appellants did not comply with r.17 (1). They failed to file their affidavit of service within 7 days of the service of the appeal. Instead, they filed their affidavit 23 days after the filing of the appeal. This is the first non-compliance by the Appellants.
- [13] Secondly, rule 17 (2) mandates that the Appellant must, within 21 days of the filing of notice of appeal, file and serve summons returnable before a judge for directions and a date for the hearing of the appeal. The Appellants also failed to comply with the requirement of rule 17 (2). Although, they filed their notice of appeal on 16 January 2017, they filed the summons for directions on 13 February 2017 (28 days after filing of

the appeal, and served it on 14 February 2017 (29 days after filing of the appeal).

- [14] Undoubtedly, the Appellants had failed to comply with rule 17 (1) by not filing the affidavit of service within 7 days of the service of the appeal on the Respondent as required by that rule. The Appellants had also failed to comply with rule 17 (2) by not filing and serving the summons for directions and a date for the hearing of the appeal.
- [15] The consequence of not complying with either rule 17 (1) or 17 (2) is automatic and by operation of rule 17 (3), which provides that if this rule is not complied with, the appeal is deemed to have been abandoned.
- [16] I accept the view expressed by his Lordship Calanchini J in *Deo's* (above) that I do not consider that such an application [seeking an order that the appeal is deemed abandoned] was necessary as Rule 17 (3) provides for the consequences of non-compliance as a matter of course and that there was no requirement for the Second Defendant to do anything further once the Plaintiff had failed to comply with Order 59 Rule 17 (2).
- [16] As was held in *Gay* (above), the provision in Rule 17(3) that failure to follow Rules 17 (1) and 17 (2) leads to an automatic abandonment of the appeal is intended to operate as a deterrence in respect of delay.
- [17] I would, therefore, find that the appeal is deemed to have been abandoned as the Appellants had failed to comply with Order 59 Rule 17 (1) and (2).
- [18] Counsel appearing for the Appellants seeks, in her written submissions, leave of the court to file an affidavit which will depose that at the relevant time when the notice of appeal was served on the Respondent's solicitors city agents, the solicitor in carriage of the appeal was on a one week medical leave and thereafter had gone on leave for three weeks. She further submits that even if leave to file the affidavit is not granted, the

court has discretion under Order 2 Rule 1 (2) of the HCR to not strike out the appeal for failure to file the affidavit of service within the time prescribed by the Rules. In essence, the Appellants invoke O.2, r. 1 (2) and invite the court to treat the failure to file the affidavit of service within 7 days after serving on the Respondent as being an irregularity arising from non-compliance with the rules and it should not be allowed to strike out the appeal.

[19] The Appellants are not entitled to invoke O.2, r.1 (2) to cure the non-compliance with the rules especially in circumstances when the appeal has already been abandoned and as a result of which there is no appeal on foot in respect of which discretion could be exercised.

[20] In *Sarojni v NLTB* [2016] HBC230.2000 (4 November 2016), I reinstated an appeal that was deemed abandoned pursuant to O.59, r.17 (3) for failure to file a summons for direction within 21 days after filing the notice of appeal on the basis that I had already granted the leave to the applicant to appeal out of time the Learned Master's ruling on assessment of damages. That situation did not arise in the Appellants' appeal. In *Sarojni's* case there was an application to reinstate the appeal that was deemed abandoned or alternatively to enlarge the time for appeal. There is no such application by the Appellants in the matter at hand. As such, *Sarojni's* case has no application to the present appeal filed by the Appellants.

### **Conclusion**

[17] For all the reasons that I have articulated herein, I would find the appeal filed by the Appellants is deemed to have been abandoned pursuant to O.59, r.17 (3) of the HCR for failing to file affidavit of service within 7 days upon serving the notice of appeal as required by rule 17 (1) and/or for failing to file and serve a summons returnable before a judge for direction and a date for hearing of the appeal as required by rule 17 (2). I



accordingly uphold the preliminary objection advanced by the Respondent. I would also order the Appellants to pay costs of \$600.00, which is summarily assessed, to the Respondent in 14 days of the date of this ruling.

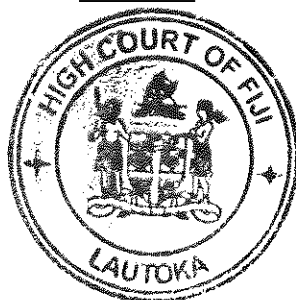
**Final Outcome**

1. Preliminary objection upheld.
2. Appeal deemed abandoned.
3. Appellants will pay costs of \$600.00 to the Respondent within 14 days of the date of this ruling.

*M. H. Mohamed Ajmeer*  
15/6/17

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**15 June 2017**