

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

**CIVIL APPEAL NO. ABU 0019 of 2018**  
**(Labasa Civil Action HBC 29 of 2012)**

**BETWEEN** : **VANUALEVU HARDWARE (FIJI) LIMITED** *Appellant*

**AND** : **LABASA TOWN COUNCIL** *Respondent*

**Coram** : Basnayake, JA  
Lecamwasam, JA  
Almeida Guneratne, JA

**Counsel** : Mr S Valenitabua for the Appellant  
Mr A Sen for the Respondent

**Date of Hearing** : 3<sup>rd</sup> May, 2022

**Date of Judgment** : 27<sup>th</sup> May, 2022

**JUDGMENT**

**Basnayake, JA**

[1] I agree with the reasoning and conclusions of Guneratne JA.

**Lecamwasam, JA**

[2] I agree with the reasoning and the conclusions arrived at by Justice Guneratne.

**Almeida Guneratne, JA**

[3] This is an appeal against the judgment of the High Court dated 15<sup>th</sup> March, 2018 which involved the interpretation and application of the provisions of Order 59 (and the Rules contained therein) of the High Court Act.

[4] By that judgment the High Court held that the Appellant was not entitled to seek extension of time in view of Order 59 Rule 10 to file a second Notice of Appeal against the decision of “*the Master*” where liability had been determined leaving the assessment of damages to be determined subsequently.

[5] The initial appeal stood as an abandoned appeal in terms of Order 59 Rule 17(3).

[6] It is in that background that the Appellant sought extension of time to file a fresh Notice of Appeal.

**The High Court Judgment (at pages 4 to 8 of the Copy Record)**

[7] The learned Judge analysed the impacting provisions of the Rules on the issue at hand principally, Rule 10.

**Order 59 Rule 10**

*“An application to enlarge time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before expiration of that period and to a single judge after the expiration of that time.”*

Order 59 Rule 17

*“17 – (1) The appellant shall, upon serving the notice of appeal on 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.”*

The established facts which the learned Judge took cognizance of

- [8] (i) The master’s decision was delivered on 11<sup>th</sup> May, 2017.  
(ii) A Notice of Appeal against the said decision was filed within the stipulated time.  
(iii) Affidavit of service was also filed in terms of the law and these are admitted in the affidavit in opposition (vide: paragraph [5] of the High Court judgment).  
(iv) There was non-compliance with Order 59 Rule 17 (the reference evidently being to Rule 17(1) and (2). (vide: paragraph [6] of the High Court judgment).

- [9] In the background of those established facts and the impacting legal provisions thereon the learned Judge reasoned thus:

*“[8] In my judgment when the appeal is deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules in terms of the legal fiction that is introduced in the said provision of law that should be the end of appeal process in the High Court in terms of High Court Rules of 1988. Any other interpretation would make ‘deeming provision’ contained in Order 59 rule 17(3) redundant and superfluous.*

*[11] The issue of extension of time to file Notice of Appeal will arise only when there no such Notice of Appeal filed. After compliance of the time period for filing Notice of Appeal there is no opportunity to seek extension if the appeal is deemed abandoned in midway in the appeal process. The due process of law needs to be followed. What is expressly stated cannot be allowed to be diluted, when the appeal is deemed abandoned it is abandoned and the error is fatal. There should be finality to a*

*determination and High Court Rules have expressly stated under which circumstances this happens and when an appeal is deemed abandoned it cannot be revived.”*

[10] Having so reasoned the learned Judge concluded as follows:-

*“[17] Once a Notice of Appeal is filed within the time against a decision of the Master in terms of the High Court Rules and the appeal is deemed abandoned in terms of Order 59 rule 17(1) there is no room to circumvent the ‘deeming provision’ by seeking to file enlargement of time to file 2<sup>nd</sup> Notice of Appeal against the same determination. The application is struck off. The cost of this application is summarily assessed at \$1,500.”*

The grounds of appeal urged against the Judgment of the High Court (at pages 1 to 2 of the Copy Record)

[11] Five grounds of appeal (numbered (a) to (e) have been urged. I shall take them *in seriatim* and make my reflections thereon.

Ground (a)

*“That the learned judge erred in law when he struck the plaintiff application for time be enlarge for the filing and serving of a notice of appeal from the decision of the Master S.Bull of 11<sup>th</sup> May 2017 under Order 59 rule 10 of the High Court Rules 1988 (paragraph 18).”*

[12] I am afraid I could not hear in Counsel’s oral submissions or see in his written submissions where any error in the Judgment of the High Court has been pointed out.

[13] In fact when questioned by Court on that aspect, learned Counsel for the appellant conceded that he was not in a position to point to any error but contended nevertheless the merits in the Master’s decision could be looked at by this Court for which contention he relied on the Supreme Court decision in **Native Land Trust Board v. Khan** [2013] FJCA 1.

[14] In that case, the Supreme Court did lay down, notwithstanding any procedural lapses in an appeal, a reviewing Court could go into and consider whether there were merits in the appeal as being (in effect) the overriding criterion.

[15] But, how could the learned High Court Judge in the instant case have considered the merits of the Master's decision when the matter His Lordship was called upon to see was whether a second appeal could have been filed in consequence of the initial appeal having been "*deemed to be abandoned*" on the application of the express provisions of the High Court Rules?

A matter of jurisdiction and the principle of separation of powers

[16] Had the learned Judge done that, he would have clearly exceeded his jurisdiction amounting to an approach obnoxious to the constitutional principle of the separation of powers.

Other impacting considerations and principles

[17] Without qualifying anything what I have articulated above, I shall now deal with the other arguments advanced by Counsel for the appellant in fairness to him.

Reliance on Section 20(1)(k) of the Court of Appeal Act

*"20(1)(k): A single judge of the Court of Appeal may exercise the following powers of the Court \_ \_ \_ generally, to hear any application, make any order or give any directions that is incidental to an appeal or intended appeal."*

[18] Placing reliance on this provision, Counsel contended that, this Court could look beyond the present High Court Judge and visit the merits of the Master's decision to see whether the decision bears scrutiny.

[19] The said section refers to the powers of a single judge of this Court.

[20] Such power of a single judge of this Court as held by Gates J, in the case of **Silimaibau & Another –v- Minister for Sugar Industry, & 2 others** needs to be given a narrow interpretation (vide: [2004] HBC 155/01L, 5 March 2004).

[21] Indeed, that provision cannot be interpreted to accommodate to catch all situations to reach beyond the present High Court judgment and to reach the merits in the Master’s decision when no error has been demonstrated in the said Judgment.

[22] What was opined by Gates J in that case I fully endorse penning this judgment for the full Court.

Reflection on the wording of Section 20(1) of the Court of Appeal Act

[23] I pause here to reflect on the said section – viz

*“A judge of the Court may exercise the following powers of the Court.”*

[24] It is indeed through recourse to this provision that the learned Counsel for the appellant advanced the aforesaid argument which he was entitled to do.

[25] However, and if so, the thinking in the decision of Justice Gates (supra) would apply to this Court (Full Court) as well.

[26] For the aforesaid reasons I reject Ground(a) urged in the Appellant’s grounds of appeal.

Re: Ground (b) in the grounds of appeal

- [27] This ground is intrinsically linked to ground (a) for which reason I reject the said ground as well.

Re: Ground (c) in the grounds of appeal

*“That the learned Judge erred in law when he failed to hold that the initial appeal was deemed abandoned due to the negligence of the Appellant’s former Counsel and as such Appellant should not be punished for it.”*

- [28] This is an issue that has occupied the judicial annals of this country for some time.
- [29] To cite some of the decisions there is the case of **Vunimoli Sawmil Limited etal –v- Amrit Sen** (ABU 0028/2013 where Calanchini P, in the course of his ruling referred to the English case of **Gatti –v- Shoosmith** [1939] 3AllER 916 where some dicta appear to support ground (c) of the appeal. (paragraph [13] of His Lordship’s ruling).
- [30] In **Vimal Construction & Joinery Works Limited and Anor. –v- Vinod Patel and Company Limited** (ABU 93 of 2006) where Calanchini P, said that,

*“A contention as to incompetence of legal advisers will rarely be sufficient and where it is, evidence in the nature of flagrant or serious incompetence \_ \_ \_ is required.”*

- [31] I myself have addressed the issue in a long line of Rulings viz: **Gregory Clark –v- Zip Fiji** ABU 003 of 2014; **Ghim Li Fashion (Fiji) Ltd –v- Ba Town Council** Misc.No.3 of 2012; **The Chief Registrar –v- Devanesh Prakash Sharma & Anor.** ABU 0012 of 2016 and **Fiji Industries Ltd –v- National Union Factory and Commercial Workers** ABU 0007 of 2016 and **Jone Batinika –v- iTaukei Land Trust Board** ABU 007 of 2020.
- [32] In the **Fiji Industries Limited** case (supra), I ruled that a misunderstanding in interpreting a Practice Direction (of the Chief Justice) by the lawyers stood visited upon their clients.

The Supreme Court in CBV 0008 of 2016 granted special leave to appeal against the said ruling but eventually dismissed the appeal.

### Resulting Position

[33] The resulting position in construing the decided precedents may be stated as follows.

### The Rule

[34] That generally, mistake by lawyers must stand visited upon their clients.

### The Exceptions

[35] That rule may be qualified in “*appropriate circumstances*” (**Herbert Construction Company (Fiji) Ltd –v- Fiji National Provident Fund** HBC 190 of 2009).

### What are the situations that may amount to appropriate circumstances?

- [36] (a) Where “*sufficient reasons*” could be shown.  
(**The Chief Registrar –v- Devanesh Sharma & Anr.** (supra))
- (b) For “*flagrant or serious incompetence*”  
(**Vimal Construction & Joinery Works Limited** (supra))
- (a) Where a “*breakdown of communications*” could be shown between the lawyers and their client **Jone Batinika’s** case (supra)
- [37] The instant case does not fall into any of those exceptions. Ground (c) of the appeal merely pleads negligence on the part of the lawyer. No acceptable material has been placed on Record.



[38] Quite apart from that, even if “*gross*” negligence on the part of the lawyer could have been shown, in the face of Order 59 Rule 17 (3) of the High Court Act, such a ground could not have been entertained.

[39] In the result, grounds (d) and (e) being consequential to the antecedent grounds urged, they too stand rejected.

#### Final Reflections and Determination

##### On the Appellant’s submissions

[40] In summary, learned Counsel for the Appellant submitted that, in his quest to assail the High Court Judgment, the merits of the Master’s decision that he was putting in issue, determining liability and leaving the amount of damages to be determined subsequently, rendered the Master’s decision interlocutory in nature and not final.

[41] I cannot see any reason how that argument could have a bearing on whether in terms of Order 59 Rule 10 read with Order 59 Rule 17 a second appeal could have been preferred.

[42] Accordingly, the submissions made in regard to Justice Kumar making an order sometime between the lines of the proceedings which had consumed as much as a period of 10 years, I was not prepared to entertain. That submission which was designed to seek a re-hearing of this matter, I am not prepared to subscribe to.

##### On the Respondent’s submission in counter to the Appellant’s submissions

[43] The Respondent’s submissions may be summarized thus:

(a) Without pointing to a specific error in the High Court judgment, the same cannot be assailed.

(b) This application is being sought for leave to appeal after 10 years where the initial right of appeal was “*deemed abandoned*”

(c) It was not possible for the Appellant to attack the Master’s decision while not being in a position to assail the impugned Judgment of the High Court which is in issue before this Court.

[44] The Appellant could not meet the Respondent’s said submissions.

*A cursus curiae in the High Court*

[45] In conclusion I recount here a consistent *cursus curiae* in the High Court in regard to the scope, interpretation and application of Rule 17.

*Vide:* **Mitchell Gay, etal –v- Resolution Trust Corporation – etal** [2010] HBA 1/09S, per Calanchini J; **Paula Malo Radrodro –v- Fiji Sugar Corporation Ltd** [2011] JBC 267/07L per Y. Fernando J.

[46] The upshot of those decisions is that:

(i) The failure to follow Rule 17(1) and (2) leads to an automatic abandonment of an appeal and is intended to operate as a deterrence.

(ii) In such a situation there is no longer an appeal in existence with no second chance leaving no room for any exercise of discretion or inherent jurisdiction to extend time to appeal.

[47] In the instant case the learned Judge has followed that *cursus curiae*.

Clear Legislative intent in the High Court Act

[48] Before parting with this judgment I wish to draw a point of comparison (or contrast) with Rule 17 of the Court of Appeal Act.

[49] While Rule 17(1) of the Court of Appeal Act compares with the procedural mandate in Rule 17(1) of the High Court Act, Rule 17(2) in the Court of Appeal Act states thus:

*“(2) If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed \_ \_ \_ \_ \_”*

[50] That stands in clear contrast to Order 59 Rule 17(3) of the High Court Act which decrees that:

*“If this rule is not complied with, the appeal is deemed to have been abandoned.”*

[51] Thus, there is a clear legislative intent expressed in regard to the respective jurisdiction of the High Court on the one hand and of the Court of Appeal on the other.

[52] Accordingly, for the aforesaid reasons, I propose my orders in this appeal as follows.

Orders of Court

1) *The appeal is dismissed.*

2) *The Appellant is ordered to pay costs of this appeal in a sum of \$5,000.00 to the Respondent within 21 days notice of this Judgment with interest in terms of the Law Reform (Miscellaneous provisions) Act.*

3) *This order for costs shall be in addition to the order for costs made by the High Court.*



**Hon. Justice E. Basnayake**  
**JUSTICE OF APPEAL**



**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**



**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**