

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL APPEAL NO: HBE 30 of 2013**

[Appealing the Master's Judgment dated 27  
October 2015 in Winding Up Action No. HBE 30  
of 2013]

**BETWEEN** : **EXTREME BUSINESS SOLUTIONS (FIJI) LIMITED** a limited  
liability company having its registered office at 34, Knolly  
Street, Suva, Fiji.

**APPELLANT/RESPONDENT COMPANY**

**AND** : **FORMSCAFF (FIJI) LIMITED** a limited liability company  
having its registered office at Lot 4, Autocity Place, Off  
Grantham Road, Raiwaqa, Suva.

**RESPONDENT/PETITIONER**

**COUNSEL** : Ms. L. Jackson for the Appellant  
Ms. M. Vasiti for the Respondent

**Date of Hearing** : 22 March 2016

**Date of Ruling** : 9 June 2016

---

**RULING**

---

## **Introduction and Background**

- [1] This is an application made by the Appellant in terms of the provisions of Order 59 Rule 10(1) of the High Court Rules 1988, for leave to appeal out of time and for enlargement of time to file and serve the Notice of Appeal.
- [2] The application for leave to appeal out of time was against the Judgment made by the Acting Master of the High Court on 27 October 2015.
- [3] The original proceedings before the Master was an application for winding up of the Appellant Company, Extreme Business Solutions (Fiji) Limited. The initial winding up proceedings were brought by UB Freight (Fiji) Limited against the Appellant Company. Subsequently, Formscaff (Fiji) Limited, the Respondent, was granted leave by the Court to file and serve a substituted winding up petition.
- [4] On 27 October 2015, the Acting Master of the High Court made Order that the substituted winding up petition filed by Formscaff (Fiji) Limited, the Respondent, be granted. Order was also made that the Official Receiver be constituted as the Provisional Liquidator of the Appellant Company in terms of the procedures provided for within the Companies law. A summarily assessed costs in the sum of \$750 was also awarded to the Respondent.
- [5] This is the Order against which the Appellant sought leave to appeal out of time from this Court.
- [6] After a full hearing of this matter Court was of the view that this was an appropriate case for the granting of leave to appeal out of time and for permitting the enlargement of time to file and serve the Notice of Appeal.
- [7] Accordingly, on the 9 March 2016, Court made the following Orders:
  1. The application made by the Appellant for the enlargement of time to file and serve the Notice of Appeal is allowed.
  2. The Appellant is hereby granted 7 days (seven days) from today to file and serve the Notice of Appeal.

3. Costs of the application shall be costs in the Appeal.

[8] Thereafter, the matter came up before me on the 22 March 2016. On that day the Counsel for the Respondent took up two preliminary objections:

1. That the Notice of Appeal is not served within the time required; and
2. That the Notice of Appeal filed by the Appellant was irregular in form as it makes provision for a returnable date and that the Appellant has not complied with the requirements of Order 59 Rule 17 of the High Court Rules 1988.

[9] Both Counsel for the Respondent and Appellant made oral submissions relating to the said preliminary issue on the same day. The two Counsel also filed written submissions, which I have had the benefit of perusing.

[10] On 22 March 2016, Court also made Order that the time for filing of any further documents prescribed in terms of the High Court Rules will stop running until such time as this preliminary issue is determined.

### **Legal Provisions and Analysis**

[11] In the Ruling made by this Court on 9 March 2016, the Appellant was granted an enlargement of time to file and serve its Notice of Appeal. Accordingly the Appellant was granted 7 days from the 9 March 2016 to file and serve the Notice of Appeal.

[12] The Appellant has filed the Notice of Appeal on 16 March 2016, which is within the stipulated time frame granted by Court. However, the said Notice of Appeal was not served on the Respondent until 21 March 2016. This is 5 days outside the time period provided.

[13] The Appellant submits that the reason for the delay is that the Notice of Appeal was not issued from the Registry until 21 March 2016. Due to the Notice of Appeal not

being issued from the Registry until 21 March 2016, the Appellant was only able to serve the Notice of Appeal on the Solicitors for the Respondent on 21 March 2016.

[14] The Respondent submits that the reason for this delay is that the Appellant used a wrong format of the Notice of Appeal. The Notice of Appeal does not require the Registry to allocate a date on it. If a correct format of the Notice of Appeal was filed, it would have been issued straight away from the Registry counter. The Appellant in this case has used a format which is similar to a Notice of Motion which requires the Registry to allocate a date.

[15] It is clear to this Court that the Appellant has in fact used a format for the Notice of Appeal which required the Registry to allocate a date on it. Having filed the Notice of Appeal in the said format, the Appellant cannot now blame the Registry for the delay or failure in serving the Notice of Appeal on the Respondent within the stipulated time frame. On 9 March 2016, this Court made specific directions that the Notice of Appeal should be filed and served 7 days from the 9 March 2016. This meant that it was incumbent on the Appellant to both file (in the Registry) and serve (on the Respondent) the Notice of Appeal on or before 16 March 2016. However, in this instance the Appellant has failed to do so.

[16] The Respondent has also taken objection that that the Appellant has not complied with the requirements of Order 59 Rule 17 of the High Court Rules 1988 (Procedure after filing Appeal). Order 59 Rule 17 reads as follows:

*(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”.*

[17] In the written submissions filed by the Appellant it is stated that the Respondent is adding to the objections that were raised in Court on 22 March 2016, by stating that the Appellant has failed to file its Summons returnable before a Judge for directions within 21 days of the filing of the Notice of Appeal and the Appellant has failed to file its Affidavit of Service within 7 days of such service. Court cannot agree with this submission. It is clearly recorded by Court that, on the 22 March 2016, the Respondent took up the following objections:

1. That the Notice of Appeal is not served within the time required; and
2. That the Notice of Appeal filed by the Appellant was irregular in form as it makes provision for a returnable date and that the Appellant has not complied with the requirements of Order 59 Rule 17 of the High Court Rules 1988.

[18] Since objection was being taken by the Respondent for non compliance of Order 59 Rule 17 of the Rules it is implicit that it includes the objection that the Appellant has failed to file its Summons returnable before a Judge for directions within 21 days [which is Order 59 Rule 17 (2)] and that the Appellant has failed to file its Affidavit of Service within 7 days of such service [which is Order 59 Rule 17(1)].

[19] The Appellant has referred to the case of **Vishal Kumar v. Avikash Pillay**, Civil Appeal Case No. HBA 04 of 2013 (14 February 2014). In this case, Her Lordship Justice Anjala Wati, at paragraphs 32, 33 and 34, explained the purpose of Order 59 Rule 17 (2) and (3) as follows:

*“I must explain the purpose of Order 59 Rule 17(2) and (3). Traditionally and even now when notices of appeal are prepared it does not have a provision*

*where the Court Registry could endorse a returnable date for Court. As a result, after the filing of the notice, the appellant's and/or their solicitor would either not bring the appeal before a Judge for directions and hearing or be slow in doing so. The appeal would thus lie in the Registry while the appellant's and/or their lawyers would either forget about it or just simply deliberately not move the matter forward.*

*The purpose of the rule 17(2) is that where the notice of appeal does not bear a provision to endorse returnable date before a Judge a summons must be filed within 21 days before a Judge for directions and hearing of the appeal. If the summons is not filed to move the appeal, the appeal would be deemed abandoned under Rule 17(3). The rule was specifically to avoid the appellant's using the Court system to 'park' their cases.*

*The notice of appeal that Mr. Ram drafted has a provision where he sought a returnable date before a Judge for directions to be given on the hearing. That provision thus has served the purpose for which the rule was created...."*

[20] In the said Judgment it is acknowledged that traditionally when Notices of Appeal are prepared it does not have a provision where the Court Registry could endorse a returnable date for Court. It is also acknowledged that where a Notice of Appeal has a provision seeking a returnable date before a Judge for directions to be given on the hearing, that would serve the purpose for which Rule 17(2) was created.

[21] Therefore, the objection taken by the Respondent that the Notice of Appeal filed by the Appellant was irregular in form as it makes provision for a returnable date can be disregarded by Court. In similar terms, the objection taken that the Appellant has not complied with the requirements of Order 59 Rule 17(2) of the High Court Rules 1988, by failing to file its Summons returnable before a Judge for directions within 21 days of the filing of the Notice of Appeal, can also be disregarded.

[22] In any event, when the matter was taken up on 22 March 2016, the Appellant was still within the 21 day time frame after filing the Notice of Appeal. That day would have lapsed only on the 6 April 2016.

[23] Similarly the Appellant was still within time to comply with Order 59 Rule 17(1) which provides that 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.

[24] The Counsel for the Appellant also referred to the Order 2 of the High Court Rules, which are the provisions dealing with 'Effect of Non Compliance' of the Rules. Order 2 Rule 1 is reproduced below:

1. (1) *Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

(2) *Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.*

(3) *The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings*

*were required by any of these Rules to be begun by any originating process other than the one employed.*

[25] Even though the Notice of Appeal filed by the Appellant was irregular in form as it makes provision for a returnable date, Court could have acted under the provisions of Order 2 and treated that failure as an irregularity and not as one which would nullify the proceedings.

[26] However, in this case there is a more fundamental issue at hand. That is that the Notice of Appeal was not served on the Respondent within the time stipulated by Court. This is not a defect that could be cured in terms of Order 2 of the High Court Rules.

[27] I wish to also make reference to Order 3 Rule 2 (Reckoning periods of time). The said Order is reproduced below:

*2. (1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.*

*(2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.*

*(3) Where the act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that date.*

*(4) Where the act is required to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date.*

*(5) Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include a Saturday, Sunday or public holiday, this shall be excluded.*



- [28] Since Court granted a period of 7 days or less (from the 9 March 2016), for filing and serving of the Notice of Appeal, Order 3 Rule 2(5), would become applicable. Accordingly, if Saturday 12 March 2016 and Sunday 13 March 2016 is excluded from the computation of time, still the Notice of Appeal should have been served on the Respondent on or before Friday the 18 March 2016. However, in this case, the Notice of Appeal has been served on the Respondent only on Monday 21 March 2016.
- [29] The Appellant submits that despite the fact that the Notice of Appeal has already been served, this Court can and ought to exercise its discretion and extend the time given to the Appellant to serve its Notice of Appeal on the Respondent. Court cannot agree with this submission. There is a specific provision in the High Court Rules, namely Order 59 Rule 10, under which such applications for extension of time for filing and serving of Notice of Appeal has to be made, as was done by the Appellant earlier in these proceedings.

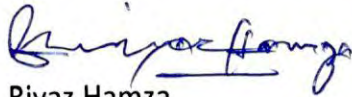
### **Conclusion**

- [30] For all the aforesaid reasons, this Court upholds the first preliminary objection taken by the Respondent that the Appellant has failed to serve the Notice of Appeal on the Respondent within the time stipulated by this Court.
- [31] Accordingly, I make the following Orders:

### **ORDERS**

1. This application is dismissed.
2. The Appellant shall pay the Respondent costs summarily assessed at \$1500, within 30 days from today.

Dated this 9<sup>th</sup> day of June 2016, at Suva.



Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**

