

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

**CIVIL ACTION NO. HBC 149 OF 2013**  
(On an appeal from the High Court of  
Fiji at Lautoka in the matter Civil  
Action No. HBC 149 of 2013).

**BETWEEN :**     **SAYLESH SANTU PRASAD** of Cuvu Sigatoka as the Administrator  
in the **ESTATE OF DIPIKA SULOCHANA NAND**, late of Namaka,  
Nadi.

**APPELLANT (ORIGINAL PLAINTIFF)**

**AND**         **EMORI RABO** of Davuilevu Housing, Suva, Circulation Officer.

**1<sup>ST</sup> RESPONDENT (ORIGINAL FIRST DEFENDANT)**

**AND**         **THE FIJI TIMES LIMITED** a Limited Liability Company having its  
registered office in Suva.

**2<sup>ND</sup> RESPONDENT (ORIGINAL SECOND DEFENDANT)**

**Appearances**         : Mr Siwan K for the appellant/original plaintiff  
                              : Mr Narayan A for the respondents/ defendants

**Date of Hearing**     : 20 November 2017

**Date of Ruling**     : 20 November 2017

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

[01] Before me, there is a summons for direction (the summons). The appellant seeks directions of the court and a date for the hearing of the appeal he has filed against an interlocutory order made by the Master's Court dismissing his claim for want

of prosecution and abuse of process of the court. The summons is filed pursuant to Order 59, Rule 17 (2) of the High Court Rules 1988 (the HCR), which provides:

*Procedure after filling appeal (O.59, r.17)*

*"17.-(1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, filed 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]

[02] At the hearing, I have heard the submission advanced by both counsel.

[03] Mr Narayan, counsel appearing for the respondents submits that there is no appeal on foot by virtue of O.59, r. 17(2). The appellant has not complied with the rule by not filing the summons for direction on time. The appellant ought to have filed the summons for direction within 21 days of the filing of the notice of the appeal. The appeal is now deemed abandoned. He cited *Deo v Ascot Motors Proprietary Ltd* [2011] FJHC 782; Action 331.2008 (18 November 2011) in support of his submission.

[04] In Deo's case (above), Hon. Justice Calanchini (as he then was) said:

*"...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...”*

- [05] In response, Mr Siwan, counsel appearing for the appellant submits that the appellant has complied with the order of the court by filing the notice of appeal within 7 days of the date of the granting of leave to appeal. He further submits that the appellant may be given an opportunity to explain on affidavit the failure to comply with O.59, r.17 (2).
- [06] The appellant filed his notice of appeal on 18 September 2017. He filed an affidavit of service on 21 September 2017. There is no dispute about the notice of appeal and the affidavit of service.
- [07] Thereafter, appellant ought to have filed and served a summons for directions and a date for hearing within 21 days of the filing of the notice of appeal. This is the requirement of Rule 17 (2). The appellant filed the notice of appeal on 16 September 2017. The summons for direction is filed on 16 November 2017. Apparently, the summons, required under Rule 17 (2), is filed 38 days out of time. According to Rule 17 (3), if the appellant does not comply with Rule 17 (2), the appeal is deemed to have been abandoned. The deeming provision will operate

automatically. The respondents need not file an application to have the appeal deemed abandoned.

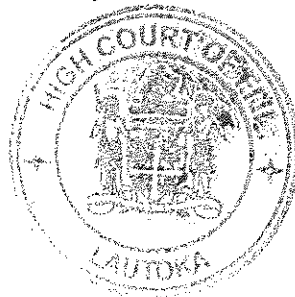
[08] The summons for direction is filed 38 days out of time. The appellant has failed to file and serve the summons for direction within 21 days of the filing of the notice of appeal as required by rule 17 (2). The appellant failed to comply with rule 17 (2). This has led to activation of the deeming provision in rule 17 (3). As a result, the appeal is deemed abandoned by operation of O.59, r.17 (3). The appellant will pay \$700.00 as cost, which I have summarily assessed, to the respondent.

### **The Results**

1. Appeal deemed abandoned.
2. The appellant will pay \$700.00 to the respondent.

*Hajjastan*  
..... 20/11/17  
**M.H. Mohamed Ajmeer**  
**JUDGE**

At Lautoka  
20 November 2017



Solicitors:

For the appellant: M/s Janend Sharma Lawyers, Barristers & Solicitors

For the respondents: M/s AK Lawyers, Barristers & Solicitors