

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

**Civil Action No.: HBC 370 of 2013**

**BETWEEN** : **AVIEL BAT TZION** also known as **UNISE RANADI** of Suva,  
Domestic Duties  
**PLAINTIFF**

**AND** : **GRAPHIC EQUIPMENT LIMITED** a limited liability company having  
its registered office in Suva.  
**1<sup>ST</sup> DEFENDANT**

**AND** : **MINGS LIMITED** a limited liability company having its registered  
office in Suva.  
**2<sup>ND</sup> DEFENDANT**

**Counsel** : **Mr. Lanyon J. for the Plaintiff**  
**Mr. Lajendra N. and Ms. Erasito A. for the Defendants**  
**Date of Hearing** : **1<sup>st</sup> May, 2018**  
**Date of Judgment** : **10<sup>th</sup> May, 2018**

**JUDGMENT**

**INTRODUCTION**

1. This is a summons seeking reinstatement of an appeal that is deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules of 1988. According to the Applicant-Plaintiff (the Plaintiff) this application is made pursuant to Order 2 rule 1 and Order 3 rule 4 of the High Court Rules of 1988 and inherent jurisdiction of the court.

**FACTS**

2. The facts of this case and conduct of the Plaintiff that resulted unless order, is found in the Master's decision of 14<sup>th</sup> February, 2017 and I do not wish to add to the same and suffice to quote paragraphs 7-8 of the Ruling delivered, below.

*'On 22<sup>nd</sup> September, 2015, the Plaintiff's Counsel informed Court that the Pre Trial Conference minutes have been formalized and accordingly filed.*

Hence this Court made further orders for the Plaintiff to file its Agreed Bundle of documents, Copy Pleadings and Order 34 Summons within a months' time frame.

On the next adjourned date of 09<sup>th</sup> November, 2015, there was no appearance by the Plaintiff/Counsel. The Orders made by the Court on 22<sup>nd</sup> September, 2015 was not complied with. Defence Counsel was asked to communicate in writing to the Plaintiff and inform her of the next adjournment date which the Defence did.

On 07<sup>th</sup> December, 2015, the Plaintiff Counsel appeared and the Court still noted that even though a reminder was sent in writing, the Plaintiff Counsel has not complied with the initial Court order of 22<sup>nd</sup> September, 2015 and subsequently adjourned dates.

On 11<sup>th</sup> February, 2016 once again there was no appearance by the Plaintiff/Counsel. Defence was informed that Ms. Ulamila Fa was engaged in a hearing at the Nasinu Magistrates Court and to seek further time to allow the Plaintiff to comply with the order.

On 16<sup>th</sup> March, 2016, there was again no appearance by the Plaintiff. This Court at this adjournment noted that time and again the Plaintiff had failed to comply with the orders of the Court to the current.

On 31<sup>st</sup> March, 2016, again no appearance from the Plaintiff was noted and had failed to file the Agreed Bundle of Documents, Copy Pleadings and Order 34 Summons. This was a complete defiance of the Court's previous directives and orders and that there was a continued default and non-compliance of the Court orders on the part of the Plaintiff/Counsel.

It was on this failure of the Plaintiff/Counsel for the **fourth** time that prompted the Defence Counsel to seek for an **"Unless Orders"**.

Accordingly, this Court acceded to the Defence Counsel's application for the imposition of the **"Unless Order"** and thus granted the orders as follows:

- **Invoke unless order that would be activated if the Plaintiff within next 14 days do not pursue this case by filing Bundle of Documents, and Order 34 Summons;**
- **For mention on unless order if non-compliance of Copy pleadings, Bundle of Documents and Order 34 Summons; Adjourned to 21<sup>st</sup> April, 2016.**

Again, on 21<sup>st</sup> April, 2016, there was no appearance by the Plaintiff/Counsel. It was also noted from the Court records that the Plaintiff had failed to comply with the **"unless order"** made on 31<sup>st</sup> March, 2016.

*The Defence Counsel herein on this Occusion did not hesitate to request Court that the matter be struck out due to the Plaintiff's non-compliance and default of the unless order in place.*

*This Court acceded to the request and accordingly made the following orders-*

- *Refer to minutes of 31<sup>st</sup> March,2016;*
- *Unless orders in place to be activated if Plaintiff doesn't comply with Copy Pleadings, Bundled of Documents and Order 34 Summons.*
- *Perused Court File non-compliance by Ms. Fa/Plaintiff on Copy Pleadings and Order 34 Summons;*
- *Therefore matter on Plaintiffs Writ of Summons and Statement of Claim is hereby struck out accordingly.*
- *On Defendants Counter-Claim, for formal proof to be assigned on 05<sup>th</sup> May, 2016.*

*It was on 05<sup>th</sup> May, 2016 that the Defence Counsel appeared to proceed with his Counter-Claim when he was informed by the Court that a Reinstatement application has been filed by Ms. Fa returnable on 17<sup>th</sup> May, 2016."*

3. The Plaintiff filed a motion to **reinstate the action** which was struck out by Master, upon non compliance of unless order, on **31<sup>st</sup> March, 2016**.
4. Having heard the above motion for reinstatement, the Master on **14<sup>th</sup> February, 2018** dismissed the application of the Plaintiff for the reinstatement. Having aggrieved by the said decision, the Plaintiff filed a notice of appeal on **7<sup>th</sup> March, 2018** and the stamp on the back of the said Notice of Appeal indicate that it was filed at 4.10 pm.
5. An affidavit of service is filed and it is sworn by a legal clerk, who had sworn that the said Notice of Appeal was served on **8<sup>th</sup> March, 2018**.
6. No summons for directions was filed in terms of the Order 59 rule 17(2) of the High Court Rules 1988 and it is deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules 1988.

## ANALYSIS

7. Appeals from the Master are dealt in Part II of the Order 59 of the High Court Rules of 1988 and state as follow

### ***PART II – APPEAL FROM THE MASTER***

#### ***Appeal from Master's decision (o.59, r.8)***

- (1) An appeal shall lie from a final order or judgment of the Master to a single judge of the High court.
- (2) No appeal shall lie from an interlocutory order or judgment of the master to a single judge of the High Court without the leave of a single judge of the high court which may be granted or refused upon the papers filed.

#### ***Time for appealing (O.59, r.9)***

An appeal from an order or judgment of the Master shall be filed and served within the following period -

- (a) 21 days from the date of the delivery of an order or judgment;  
Or
- (b) in the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.

#### ***Extension of time (O.59, r.10)***

- (1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.
- (2) An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit.

#### ***Application for Leave to Appeal (O.59, r.11)***

Any application for leave to appeal in interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.

#### ***Notice of appeal (O.59, r.12)***

An appeal shall be brought by way of a notice of appeal, which may be given in respect of the whole or any specified part of the order or judgment of the Master.

#### ***Cross-appeal (O.59, r.13)***

Where a respondent to an appeal under this part wishes to appeal, the respondent shall file and serve a notice of cross-appeal within 7 days from the service of the notice of appeal.

***Contents of notice of appeal and cross-appeal (O.59, r.14)***

A notice of appeal or cross-appeal filed under rules 12 or 13 shall state –

- (a) Whether the appeal is from the whole or part only and what part of the order or judgment of the Master;
- (b) The grounds of appeal succinctly;
- (c) The precise form of the order which is sought in place of the order or judgment of the Master.

***Amendment of notice of appeal and cross-appeal (O.59, r.15)***

- (1) A notice of appeal or cross-appeal may be amended by or with leave the Court.
- (2) An application for amendment under paragraph (1) shall be by way of a summons filed and served on each of the parties to the appeal not less than 14 days before the date on which the appeal is listed for hearing.

***Stay of proceedings or execution (O.59, r.16)***

- (1) The filing of a notice of appeal or an application for leave shall not operate as a stay of execution or proceedings, or any step therein, unless the Court so directs.
- (2) An application under paragraph (1) shall be made by way of an inter-partes summons supported by an affidavit.

***Procedure after filing appeal (O.59, r.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 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."  
(underlining is added)

8. Though the Appeal was filed within 21 days (i.e 21st day around 4.10 pm) it was not served within the 21 days. This is non-compliance of Order 59 rule 9 of High Court Rules 1988, and Order 59 rule 10 of the High Court Rules of 1988 deals with the extension of the time period for the filing of an Appeal and or service of the same. Such an application can be made by inter partes summons. (See O. 59 r10 (2)).
9. So the Plaintiff should have sought extension of time to serve the Notice of Appeal, which they did not, but the conduct of the Plaintiff after that was further disregard of the High Court Rules 1988, that resulted in the appeal deemed abandoned.

10. The procedure after filing an appeal was not complied by the Plaintiff. The Plaintiff was required to file and serve, summons for directions within 21 days from the filing of the summons.
11. The consequence of such failure is contained in Order 59 rule 17(3) of High Court Rules 1988 and the purported appeal is now deemed abandoned. I used the word purported appeal as it was not served within the time period stipulated in Order 59 rule 9 of High Court Rules 1988. There was no application for extension of the said time period for serving which was done one day late. The Notice of Appeal was filed in the registry at 4.10pm on the 21<sup>st</sup> day and it was released on the same day, but was served to the Defendants following day, without seeking extension of time.
12. When a Notice of Appeal, is filed after 4 pm on the last day for filing and serving, the Plaintiff would know the difficulty in serving the same to the Defendants and when it was done outside that time period, without seeking extension of time, on the following day it was a breach of Order 59 rule 9 of the High Court Rules of 1988.
13. The present application is a reinstatement, of the purported appeal which was deemed abandoned due to non compliance of Order 59 rule 17 (2) of the High Court Rules of 1988 . So, even reinstatement of deemed abandoned appeal will not be sufficient to cure the repetitive non-compliance of the Plaintiff.
14. It should be noted that there is no provision contained in the Order 59 rule 17 or any other rule expressly dealing with the consequences of 'deemed abandoned' appeal in terms of Order 59 rule 17(3) of High Court Rules 1988. This is contrary to Court of Appeal Rules 1949, where express provision is contained where a 'fresh notice of appeal may be filed' before a stipulated time from the default. The said rule 17 of Court of Appeal Rules 1949 is quoted below for completion.

*"17.(1) The appellant must –*

*(d) 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:*

*(e) 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.*

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

*(a) In the case of an appeal from an interlocutory order – 21 days;*

*Or*

*(b) In any other case 42 days,*

*Calculated from the date the appeal is deemed to be abandoned.*

*(3) Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2) " (underlining added)*

15. There is no provision in the High Court Rules of 1988, to adopt Court of Appeal Rules 1949, even when there is a lacuna. So, application of the Court of Appeal Rules 1949, and allow a fresh notice of appeal or extension of time to file a fresh notice of time in my judgment is not the correct construction of Order 59 rule 17 of the High Court Rules of 1988.
16. If a fresh application for a notice of appeal or extension of time for such an application is filed it would defeat the purpose of Order 59 rule 17(3) of the High Court Rules and there would not be an end to a party who repeatedly disregard such a rule and this would be a clear abuse of process. So such an interpretation that could lead to abuse of the process is to be avoided.
17. In Court of Appeal, Calanchini P in *Fiji Teachers Union Vs Dominion Insurance Limited* (decided on 2<sup>nd</sup> December, 2016) referring to the Court of Appeal Rules 1949, at paragraph 10 said that even when there is express provision to make a fresh notice of appeal, such as in terms of Court of Appeal Rule 17(2), such rule should only confine to one fresh notice of appeal. This interpretation of Court of Appeal is based on absurdity of allowing fresh application, each time there is a default. This is when there is express provision in Court



of Appeal Rules 1949, allowing a fresh application, when the appeal is deemed abandoned. If the same ratio is applied, it is logical to conclude that there is no room even for once to bring a fresh application for notice of appeal, when no such provision is allowed.

18. So, in my judgment in the absence of any express provision contained the Order 59 rule 17 of the High Court Rules of 1988 allowing a fresh application of Notice of Appeal, when an appeal is deemed abandoned, there is no room for a defaulting party to make a fresh application for a Notice of Appeal or an extension of time for such a renewed application for Notice of Appeal. In the High Court a party is given only one opportunity to proceed with the appeal and having activated the process of the appeal such a party is not allowed to utilize the same resources for the second time, when the appeal is deemed abandoned in terms of Order 59 rule 17(3) of High Court Rules 1988.
19. Deemed abandoned is a legal fiction. In the interpretation of such a legal fiction, one must ascertain the purpose such a 'legal fiction' was created. (See Ex parte, Walton, In re Levy (1881) 17 Ch D 746 p 756.
20. Order 59 rule 17(3) of High Court Rules 1988 is meant for appellant to take necessary steps to prosecute the appeal within stipulated time period, and not to file an appeal and neglect or delay taking necessary steps. Such inordinate delay is to be avoided and for that it is a requirement to file summons for directions. So, this is a provision for proper case management. It is a provision to stop clogging the High Court with half hearted appeals or uninterested parties from appealing for the sake of appeal when there is a right to appeal. This is a provision that reduce or eliminates abuse of process, through an appeal so that there will not be a finality to the decision.
21. After ascertaining the reason, the court is required to apply it and the purpose should not be allowed to subvert, through other means. (See East End Dwelling Co Ltd v Finsbury Borough Council (1951) 2 All E.R 587 p 599.



22. Lord Asquith in *East End* (supra) p 589 held,

*'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.'*

23. If a fresh application for Notice of Appeal, is allowed when an appeal is deemed abandoned in terms of Order 59 rule 17(3) of High Court Rules 1988, it would encourage a reluctant appellant who does not want to proceed to hearing of the appeal to delay the appeal thus preventing finality to the determination of Master. Such a construction will lead to absurd situation, and there would not be an end to the proceeding prior to the appeal, without hearing of the appeal. This may be the preferred outcome of an appellant who is not interested about the appeal but still prevents finality of the decision by appealing and wasting time in the appeal process rather than swiftly proceeding to the appeal as intended by Order 59 rule 17(3) of High Court Rules of 1988

24. While it is important to allow due process of the law, it is also important to prevent the same process being abused.

25. So, I reject the contention by the Defendant that the proper procedure is to file a fresh application seeking extension of time as allowed in the Rule 17(2) of Court of Appeal Rules 1949. The Court of Appeal case submitted by the Defendant is not an authority to reject the method adopted by the Plaintiff, in the High Court when the appeal is deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules of 1988.

26. What is the remedy for an appellant whose appeal is deemed abandoned in terms of Order 59 rule 17(3) of High Rules 1988? The remedy available for such a party is reinstatement of the appeal and also to seek extension of time to file summons for direction. The Plaintiff in the summons filed had sought such orders.

27. As I stated earlier since the notice of appeal was served without seeking extension of time outside the 21 day time even reinstatement would not help the Plaintiff, as there was no proper appeal to be reinstated.

28. This summons is to be struck out, as there was no appeal filed in terms of Order 59 rule 9 of the High Court Rules prior to it was deemed abandoned, in terms with Order 59 rule 17(3) for failure to comply Order 59 rule 17(2) of the High Court Rules of 1988.
29. Even if I am wrong on that, in an application for reinstatement the Plaintiff needs to satisfy the reason for non compliance of Order 59 rule 17(2) High Court Rules 1988 and also merits of the appeal. Since the appeal is deemed abandoned there should be cogent reasons for delay as well as more than an arguable merits in the appeal.
30. The time period for compliance of Order 59 rule 17(2) High Court Rules 1988 started on the date of filing of the Notice of Appeal, which was 7<sup>th</sup> March, 2018 and ended on 28<sup>th</sup> March, 2018. The reason given by the Plaintiff was a tropical depression and rain and flooding.
31. In the affidavit in support the deponent is non-specific as to the exact date, when the alleged closure of the office of the High Court. According to paragraph 7 due to the rain associated with tropical depression they could not obtain instructions. This is not a satisfactory explanation for non-compliance of Order 59 rule 17(2) of the High Court Rules 1988. To file summons for directions there was ample time and present application for reinstatement and extension of time was filed 16<sup>th</sup> April, 2018 nearly 19 days after expiration of the time period laid in Order 59 rule 17(2) of the High Court Rules of 1988.
32. So, not only that Plaintiff defaulted filing of the summons for directions but also has not swiftly acted after the default in filing an application for reinstatement. Tropical depressions and even cyclones are not an unusual phenomenon in South Pacific, during this period and it should not be a scapegoat for defaults such as the conduct of the Plaintiff.
33. It should be noted that non compliance of Order 59 rule 17(2) of the High Court Rules of 1988, results in appeal deemed abandoned. Such a draconian legal fiction is used to compel a party for compliance. So the reason for non compliance should also equally cogent reason for default. If not the purpose of Order 59 rule 17(3) High Court Rules 1988 is diluted and

a party is allowed to take any excuse such as adverse weather condition that is prevalent, without any difficulty.

34. I do not need to consider the merits of the appeal since the reasons for delay is not satisfactory, but I consider the merits for completion.
35. The appeal is from the master's decision not to reinstate the Plaintiff's claim, which was struck out for non compliance of an unless order. As I have quoted before in this judgment Master has considered the conduct of the Plaintiff and the repeated non compliance of the orders of the Master in his decision from paragraph 7-18 of the decision, and declined it on 14.2.2018.
36. The Master has in his decision has considered the reasons given for non compliance of the unless order, and he was not satisfied with that. I cannot see any error on that decision. The reasons given for non-compliance of the unless order cannot be accepted. When the court had given an ultimatum, such as unless order it should be taken seriously and if not the purpose of an unless order is lost.
37. The conduct of the Plaintiff is amply described in the Master's decision and the reasons given for non compliance of an unless order is unsatisfactory, to say the least.
38. There seems to be some confusion as to the correct procedure for non compliance of an unless order and this had resulted Master deciding that correct procedure is an appeal . but this is when he had already held the reasons given for non-compliance as not acceptable. So even there is an error on that part it would not change the final outcome as a party needs to first satisfy adequately the reasons for delay in any application whether it is an appeal or reinstatement with extension of time.
39. In Fiji High Court decision, *Peters v Seashell@Momi Ltd* [2012] FJHC 868; HBM09.2011L (15 February 2012) it was held,

## **"RE-INSTATE OR APPEAL?"**

[14] *There appears to be much confusion as to whether the striking out or dismissal of an action pursuant to an "unless" order where no hearing on the merits took place should be appealed or whether it should be the subject of an application to re-instate before the Master or Judge that made the order. Recently, several decisions of this Court were delivered on the question: Westmall Ltd v CUL (Fiji) Ltd [2010] FJHC 448; HBC175.2001L (6 October 2010); Nakesu v Lakoiniusiladi [2012] FJHC 828; HBC113.2009 (27 January 2012); Samat v Qeletai [2012] FJHC 844; HBC201.2002L (30 January 2012); Gulf Seafood (Fiji) Ltd v Native Land Trust Board [2012] FJHC 853; HBA28.2011 (2 February 2012); NBF Asset Management Bank v Krishna [2012] FJHC 835; HBC129.1999L (2 February 2012). The consensus is that the proper procedure is an application to re-instate rather than an appeal.*

[15] *That being the case, the applicant's current application to enlarge time to appeal is misconceived. But, having regard to the fact that his counsel had filed and later withdrew an application to re-instate, on a misapprehension of the proper procedure, I would deal with his current application as if it were an application to re-instate rather than an application to enlarge time to appeal.*

[16] *Further, it is common ground that the initial appeal was filed in time. So in that sense the respondent could not be said to be disadvantaged or prejudiced if the appeal were to be re-instated.*

40. In the Fiji High Court decision of Samat v Qeletai [2012] FJHC 844; HBC201.2002L (30 January 2012) again this issue was raised and it was held,

*"16] The courts must be able to freely apply the useful armory of unless orders in their day to day case management. Currently in Fiji, the Master of the court handles most of the pre-trial steps and the cases are adjourned before a judge for hearing. Therefore, the Master must have the flexibility to exercise this discretionary powers of making unless orders. I will reason out the jurisdiction of the Master to make unless orders later on in my judgment. When exercising such powers the Master must ensure that the unless orders are fair and reasonable and the consequences are proportionate to the breach. In appropriate situations the Master could vary or set aside the unless order. However, care should also be taken that unless orders are not construed as an idle threat, not intended to be carried out*

*[29] 'Unless orders' that are made in the exercise of inherent powers of the court and solely for the purpose of compelling parties on procedural*

*compliance are not made on merits. Therefore in my mind, an unless order made either by a Master, a Magistrate or a Judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not functus officio. This however would be in contrast to a ruling made by the Master in exercising the statutory powers under O 25 r. 9 where matters could be struck out for want of prosecution. A decision made by the Master considering the objections placed before him on a show cause notice under O.29 r.9, is final in nature although not considered on the merits of the cause. Therefore, an aggrieved party would be required to appeal against such an order vis a vis an application to re-instate."*

41. From the above decisions of the Fiji High Court, it is clear that the proper course for a party who had not complied with an unless order to make an application for reinstatement to the same court with an explanation as to the non-compliance, coupled with a request for extension of time.
42. In *Marcan Shipping (London) Limited Vs George Kefalas et al* [2007] EWCA Civ 463 UK Supreme Court considered the plight of non compliance of an unless order . in the light of the CPR which had introduced specific provisions for case management. It was held that there was no significant difference between the former rules (i.e Supreme Court Rules of UK) and the present CPR. At paragraph 10 it was held,

*'In order to ensure that its process is not subverted so as to become an instrument of injustice every procedural system must place at the disposal of the court the power to manage proceedings before it, if necessary by imposing sanctions on litigants who fail to comply with its rules and orders. The ultimate sanctions of course, is to dismiss the claim or strike out the defaulting party's statement of case. A well-recognized way of imposing a degree of discipline on dilatory litigant is to make what is known as an "unless" order by which a conditional sanction is attached to an order requiring performance of a specified act by a particular date or within a particular period. Although the CPR have given the court greater powers to control proceedings and a greater responsibility for ensuring that they are conducted fairly and efficiently, for reasons which will become clear in due course I do not think that there is a significant difference between the approach to this problem adopted under the former Rules of the Supreme Court and that which is now embodied in the CPR.'*

43. In *Marcan* (supra) it was further discussed the history of the conditional orders and how they have been considered by the court in early decisions where it was held that once the

time period for unless order had lapsed there was no jurisdiction for the same court to determine non-compliance of the conditional order. This position changed in Samuels v Linzi Dresses Ltd [1981] Q.B. 115 [1980] 1All ER 803 at p 126 and held, that a court which imposed unless order can even extend the time even after the expiration time. It was further held that power 'was one which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored.'<sup>1</sup>

44. In Samuels v Linzi Dresses Ltd [ 1980] 1 All ER 803 at p812 held,

*'In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that order are made to be complied with and not to be ignored. Primarily it is question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not'*

45. This conduct of the Plaintiff has continued even in the appeal and that had resulted the appeal deemed abandoned. The Plaintiff has applied for reinstatement to Master and an appeal is not the correct mode.
46. Bill of Rights contained in Section 15 of the Constitution of The Republic of Fiji while emphasizing that every person in civil suit has a right to have the matter determined by a court or law or by impartial and independent tribunal, in Section 15(3) states that there is a 'right to have the case determined within a reasonable time'.
47. What is reasonable will be determined considering the circumstances of the case, and the Plaintiff cannot delay the proceedings which he initiated thus violating the rights of the Defendants. So, a Master or a Judge needs to control the conduct of the proceedings and should not give in to the parties and unless order is one tool that can be effectively utilized.
48. By the same token, if a party had failed to comply such an unless order such party is not shut out from seeking redress for extension of time and for that there should be a

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<sup>1</sup> Marcan Shipping (London) Limited Vs George Kefalas et al [2007] EWCA Civ 463 paragraph 12



satisfactory explanation of the non compliance. Since the court is not inclined to issue an unless order in the first instance, the reason given should be a cogent one and discretion is with the judge or the Master to consider other factors such as prior conduct as well as subsequent conduct of the defaulting party.

49. It is appropriate to state the words of Lawrence Lolling LJ in Fattal v Walbrook Trustee (Jersey) Ltd [2008] EWCA Civ 427 (2008) All ER (D) 109 (May)

*"An appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the general ambit of the discretion entrusted to a judge."*

The same can be applied to Master's decision regarding case management where an unless order is made. It is rare to interfere with such decision by a judge.

50. Although there is an error on the part of the Master's decision as to the proper mode of application by the Plaintiff after the expiration of unless order, he had considered the reasons given for the default and was not satisfied with that. So there are no merits in the appeal against Master's decision of 14.2.2018.

## CONCLUSION

51. The purported appeal of the Plaintiff is deemed abandoned in terms of Order 59 rule 17(3) and the proper procedure is to seek reinstatement with extension of time period to serve the summons for directions. First there was no proper appeal in terms of Order 59 rule 9 of High Court Rules 1988 since the service was delayed, and no extension of time under Order 59 rule 10 of High Court Rules 1988 was sought. So the summons can be struck off without considering merits as there was no proper appeal. Without prejudice to that, the Summons for reinstatement of an appeal and extension of time period for the summons for directions needs to be struck off as the reason for non compliance of Order 59 rule 17(2) is not satisfactory. Apart from that there are no merits in the appeal, too. The summons for reinstatement of the appeal filed on 16<sup>th</sup> April, 2018 is struck off. The cost of this application is summarily assessed at \$1,000 to be paid within 21 days.

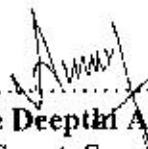


**FINAL ORDERS**

- a. The Summons for reinstatement of the appeal and extension of time filed on 16.4.2018 struck off.
  
- b. Cost is summarily assessed at \$1,000 to be paid within 21 days.

**Dated at Suva this 10<sup>th</sup> day of May, 2018**



  
.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**