

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 051 of 2024
[High Court Case No. HBC 65 of 2020]

BETWEEN : **SAILESH CHAND**

Appellant

AND : **DAVENDRA PRASAD**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. R. Prasad for the Appellant**
Mr. A. Patel for the Respondent

Date of Hearing : **01 April 2025**

Date of Ruling : **14 April 2025**

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RULING

[1] The appellant has filed a timely notice & grounds of appeal on 23 November 2023 under ABU 116 of 2023 against the High Court ruling dated 08 November 2023¹. Affidavit of service and summons for security for cost had been filed on 01 December 2023 again in a timely manner. Summons for security for cost had been determined on 22 January 2024 at \$3000.00. The appellant had failed to deposit the said sum within 28 days as directed by the

¹ **Chand v Prasad** [2023] FJHC 840; HBC65.2020 (8 November 2023)

Chief Registrar (CR) and as a result by notice of non-compliance (or notice of abandonment) dated 20 February 2024 the appeal had been marked abandoned for breach of Rule 17(1)(b) of the Court of Appeal Rules. However, the notice of discontinuance had been signed by the CR on 09 May 2024 and dispatched to the appellant's solicitors on 15 May 2024 by the Court of Appeal Registry via email. It appears that the appellant's solicitors have filed the current application on 28 May 2024 seeking leave to appeal out of time in terms of Rule 17(3), presumably on the basis that they had failed to file a fresh appeal within 42 days since 20 February 2024 as permitted by Rule 17(2)(b).

- [2] Should the 42 days allowed by Rule 17(2)(b) be counted *from the date of the appeal is deemed to be abandoned*. That is what Rule 17(3) literally states. However, does it make any rational sense if and when the appellant is not informed of the abandonment or does not know that the appeal had been abandoned? My answer is 'no'. It does make sense only if the appellant fails to file a fresh appeal within 42 days after the appellant is made aware by the Chief Registrar or by the Court of Appeal Registry on his behalf or otherwise become aware of the abandonment. This is the only interpretation that will align itself and be consistent with paragraph 8 of the Practice Direction 01 of 2023 issued by Almeida Guneratne, P and the earlier decisions of His Lordship Guneratne, JA quoted in the following paragraph which formed the basis for the said paragraph 8 of PD 01 of 2023.
- [3] In this case, as I have already stated the notice of abandonment is dated 20 February 2024 but the CR had signed it on 09 May 2024. This is, to say the least, is unsatisfactory. Ideally, the CR should sign the notice of abandonment at or about the date of abandonment. The notice of abandonment had been sent *via* email to the appellant's solicitors on 15 May 2024. However, if 42 days are counted from 15 May 2024, the appellant was well within time to file a fresh appeal by the time he filed the current application for extension of time to appeal. On the other hand, by 15 May 2024, the 42 days' time period given for the appellant to file a fresh appeal from 20 February 2024 [if one literally follows Rule 17(2) as the date of reckoning] had long lapsed automatically. This needless to say is a complete anomaly and the framers of the Court of Appeal Rules would not have imagined to place an appellant in such a precarious situation by strict and literal application of Rule 17(2) as to when the time

starts running for a fresh appeal to be filed. Time cannot start to run when the appellant, being the affected party that is expected to take remedial action, is ignorant of the abandonment.

[4] Nevertheless, there is an equally, if not even more important aspect to the validity of the abandonment which I shall discuss now. As per Practice Direction 01 of 2023 (signed on 23 June 2023 by the President of this court but took effect from 27 June 2023) in whatever circumstance an appeal is marked as ‘having been abandoned’ it must be submitted for the sanction of a justice of appeal and a ‘notice of abandonment’ must be sent to the party affected. It must also be noted that as far back as in 2020/2021 Almeida Guneratne, JA said² that before the decision that “*an appeal is deemed to have been abandoned*” the relevant file ought to be placed before a judge of appeal for judicial sanction and the Chief Registrar is required to give notice of abandonment of an appeal to an appellant concerned. I am afraid in this situation concerning the appellant, as evident from a perusal of the court file in ABU 116 of 2023, the matter had not been placed before a Justice of this court for sanctioning the abandonment. Therefore, the appellant’s appeal could not be deemed to have been abandoned. Thus, the appeal ABU 116 of 2023 is still legally on foot.

[5] Therefore, in the circumstances given above I do not have to consider the summons for extension of time to appeal for merits of the appeal grounds at this stage of the proceedings in ABU 51 Of 2024, for if not for the so called abandonment, the appeal in ABU 116 of 2023 should have automatically (subject, of course, to the compliance with the CA Act, its Rules and PDs) proceeded to the Full Court particularly subject to the security for cost being deposited in time. The merits of the appeal is a matter for the Full Court.

[6] I am therefore inclined to hold that there is no legally valid abandonment of the appeal under ABU 116 of 2023 and the appellant need not have filed summons for extension of time to appeal as it had 42 days since 15 May 2024 to file a fresh appeal without leave of this court.

² **Sun (Fiji) News Ltd v Chand** [2020] FJCA 167; ABU058.2019 (3 September 2020); See also **Alspec Holdings Ltd v Ministry of Works, Transport & Public Utilities** [2020] FJCA 196; ABU0064.2018 (8 October 2020); **Sharma v Native Land Trust Board** [2021] FJCA 202; ABU53.2018 (19 November 2021)

He had not done so, obviously he thought that the period of 42 days was over by the time he received the notice of non-compliance from the date of abandonment *i.e.* 20 February 2024.

- [7] I also consider the fact that the appellant's solicitors on 19 February 2024 had sought time from the Chief Registrar till 23 February 2024 to pay the security for cost deposit. The time to pay the deposit was to end on 19 February 2024. The appellant had not received any reply to that letter except the notice of abandonment on 15 May 2024. The appellant's solicitors are said to have then filed summons for extension of time to pay the security for cost but advised by the CA Registry that instead he had to seek an extension of time to file his appeal. However, I do not see such an application in the court file in ABU 116 of 2023 and the respondent states that he was not served with such application either. Before the notice of abandonment was signed by the CR on 09 May 2024, the appellant's solicitors had by their letter dated 24 April 2024 again sought a short extension from the CR to file security for cost. That letter appears to have triggered the process of signing of the notice of abandonment by the CR on 09 May 2024 and dispatched by the CA Registry on 15 May 2024.
- [8] Thus, I am convinced that there had not been a valid abandonment because the notice of non-compliance did not have the judicial sanction and therefore the abandonment is null and void *ab initio*. However, there is no specific provision in the Court of Appeal Act or its Rules or Practice Directions permitting a reinstatement of an appeal after being 'deemed abandoned'. However, until a statutory amendment or a Practice Direction specifically permitting a reinstatement is put in place, when this court holds that the appeal could not have been "*deemed to be abandoned*", the precedent in ***Sun (Fiji) News Ltd v Chand*** provides sufficient authority for an order for reinstatement of the appellant's appeal in as much as I have already held that the notice of non-compliance did not have the judicial sanction. On the contrary, if the abandonment had been duly effected as required by ***Sun (Fiji) News Ltd v Chand*** (now by PD 01 of 2023 read with PD 1 of 2019), then no reinstatement is possible but the appellant had to necessarily act under Rule 17(3).

- [9] The CR's administrative and quasi-judicial authority to extend the time within which security for cost must be deposited had not been disputed by this court³. Further, the power of a single Judge to grant extension of time to deposit security for cost if the CR refuses to grant the same too had been recognized⁴ provided there is an application to that effect before court.
- [10] In this case, as I said before I do not have an application for extension of time to deposit security for cost. Therefore, I cannot grant an extension of time for the appellant to pay the security for cost. But, I could and should reinstate the appeal in ABU 116 of 2023 as the logical consequential and incidental order to the declaration that the notice of abandonment is invalid ab initio. In the end, therefore, on the basis of my conclusion that the appeal is still on foot and not abandoned, I would direct the appellant to make an application to the CR to seek an extension of time to pay the security for cost.
- [11] In the light of my decision, there is no need to consider the summons for extension of time to appeal now in ABU 51 of 2024. If the appellant still wishes to seek stay of the orders on the vacant possession dated 05 November 2021, that application has to be made in ABU 116 of 2023 after paying security for cost. Since, there is no need to maintain the current extension of time to appeal application, the appellant should withdrew the same by filing a notice of discontinuance in ABU 51 of 2024.


³ **Instant Holdings (trading as Instant Hire Services) v Verma** [2022] FJCA 193; ABU0022.2021 (9 November 2022); **Land Transport Authority v Kunal Chand** [2023] ABU 10 of 2022 (17 February 2023) by Guneratne, P

⁴ *ibid*

Orders of the Court:

1. *Abandonment of the appellant's appeal in ABU 116 of 2023 is declared null and void.*
2. *Appellant's appeal in ABU 116 of 2023 is pro forma reinstated.*
3. *Appellant is directed to apply to the Chief Registrar within two weeks hereof for an extension of time to pay security for cost.*
4. *If the appellant fails to comply with order [3], I hereby sanction the abandonment of the appeal in ABU 116 of 2023 without any further notice of abandonment being served on him by the Chief Registrar.*
5. *The appellant is directed to terminate the proceedings in ABU 051 of 2024 by filing a notice of discontinuance within two weeks hereof.*
6. *No order for cost.*




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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Messrs Fazilat Shah Legal Lawyers for the Appellant
Ravneet Charan Lawyers for the Respondent