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

CIVIL APPEAL NO. ABU 07 of 2024
[In the High Court at Lautoka Case No. HAC 220 of 2013]

BETWEEN : **VILIAME WAQANINAVATU**.

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
Mr. S. Kant for the Respondent

Date of Hearing : **19 February 2025**

Date of Ruling : **13 March 2025**

RULING

[1] The appellant had filed four separate applications for constitutional redress under section 44 (1) of the Constitution in the High Court complaining as follows:

a. When he was sentenced by the High Court on 23rd February, 2018, the trial judge failed to inform him of his right to Appeal. (Application- 1) ,
b. On 21st February, 2018, the Lautoka High court disallowed him being present in Court during the summing up of the Criminal proceeding. (Application-2)
c. On 21st February,2018 , the Lautoka High Court failed to accord the applicant a fair trial, when the learned trial judge directed the assessors to assess the evidence with the Wisdom of the "Fijian Lifestyle" (Application-3)
d. He was arrested and charged for the offence of conspiracy to defeat the cause of justice, for which offence the he was already convicted and sentenced and the evidence with respect to his earlier conviction were concealed from him.

[2] The respondent had filed *inter-parte* summons to strike out the appellant's applications pursuant to Rule 3(2) read with Rule 7 of the High Court (Constitutional Redress) Rules 2015, Order 18 Rule 18 of the High Court Rules 1988, and section 44(4) of the Constitution.

> *"Section 44 (4) of the Constitution states:*
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> *(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.*
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> *Rule 3(2) of the Constructional Redress Rules states:*
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> *An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period.*[1]
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> *O.18 r. 18 of the High Court Rules 1988 states as follows:*
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> *18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
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> *(a) it discloses no reasonable cause of action or defence*[2]*, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious*[3]*; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action*[4]*; or*

[1] If a party fails to comply with procedural rules or court orders, the court may strike out their pleading. In **Biguzzi v Rank Leisure Plc** [1999] 1 WLR 1926 (CA), the court emphasized that striking out is a severe sanction but can be justified for persistent breaches of procedural rules.

[2] Here the court assumes that the facts pleaded are true but assesses whether they give rise to a legally recognized claim or defence. In **Attorney-General of Duchy of Lancaster v London & North Western Railway Co** [1892] 3 Ch 274, the court emphasized that pleadings should disclose a cause of action that has a legal basis; In **Drummond-Jackson v British Medical Association** [1970] 1 WLR 688 (CA) a claim was struck out as it failed to disclose a reasonable cause of action Pearson LJ said that a reasonable cause of action, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered and as long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out.

[3] A pleading may be struck out if it contains scandalous, unnecessary, or irrelevant allegations that do not assist the court in resolving the matter. In **Price Meats Ltd v Barclays Bank Plc** [2000] 2 Lloyd's Rep 10, pleadings were struck out as they included irrelevant material that embarrassed the defence

[4] If a party delays prosecution of their claim, leading to prejudice to the opposing party, the court may strike out the action. In **Birkett v James** [1978] AC 297 (HL), the House of Lords held that inordinate and inexcusable delay that prejudices the defendant may justify striking out the claim.

(d) it is otherwise an abuse of the process of the court[5];
and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be…"

[3] The counsel for the respondent had based his application for striking out on the absence of reasonable cause of action, contravention of Rule 3 (2) of the Constitutional Redress Rules in that the appellant's applications were outside 60 day period, availability of an adequate alternative remedy and also contended that if the High Court were to grant the orders sought by the applicant, it would be seen as usurping the functions of the Criminal Court and a hindrance to the criminal justice system. The respondent succeeded and the High Court in its Ruling on 14 November 2022 struck out all four of the appellant's Constitutional Redress applications.[6] The appellant has sought leave to appeal out of time against the said Ruling.

Law on enlargement of time.

[4] It is well settled now that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time[7]. However, the appellate courts always consider five non-exhaustive factors to ensure a principled approach to the exercise of the judicial discretion in an application for enlargement of time namely (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? and (v) if time is enlarged, will the respondent be unfairly prejudiced?[8] Nevertheless, these matters should be considered in

[5] A claim is considered an abuse of process if it is oppressive, pointless, or seeks to re-litigate issues already decided. In **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529 (HL), the House of Lords struck out an action that sought to re-litigate issues already decided in criminal proceedings, reinforcing the principle against abuse of process; In **Henderson v Henderson** (1843) 3 Hare 100, a case was struck out on the principle that parties must bring forward their entire case in one proceeding rather than fragment litigation.

[6] **Waqaninavatu v State** [2022] FJHC 721; HBM34.2020 (14 November 2022)

[7] **State v Minister forTourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

[8] **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013); **Fiji Revenue and Customs Services v New India Assurance Co. Ltd.** [2019] FJSC 34; CBV0020.2018 (15 November 2019); **Norwich and Peterborough Building Society v Steed** (1991) 2 ALL ER 880 C.A; **CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704.

the context of whether it would be just in all the circumstances to grant or refuse the application and the onus is on the appellant to show that in all the circumstances it would be just to grant the application[9]. In order to determine the justice of any particular case the court should have regard to the whole history of the matter, including the conduct of the parties[10]. In deciding whether justice demands that leave should be given, care must also be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant[11].

Reasons for the delay

[5] Since the reason for the delay is an important factor to be taken into account, it is essential that the reason is properly explained - preferably on affidavit - so that the court is not having to speculate about why the time limit was not complied with. And when the court is considering the reason for the delay, the court should take into account whether the failure to observe the time limit was deliberate or not. It will be more difficult to justify the former, and the court may be readier to extend time if it was always intended to comply with the time limit but the non-compliance arose as a result of a mistake of some kind.[12]

Length of delay

[6] The length of the delay is determined by calculating the length of time between the last day on which the appellant was required to have filed and served its application for leave to appeal and the date on which it filed and served the application for the enlargement of time.[13] 40 days have been considered 'a significant period of delay'[14]. Delay of 11 days[15] and 47 days[16] also have defeated applications for enlargement of time. Even 04 days delay

[9] **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)
[10] **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86
[11] Per Marsack, J.A. in **Latchmi v Moti** (supra)
[12] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)
[13] **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)
[14] **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)
[15] **Avery v Public Service Appeal Board** (supra)
[16] **Latchmi v Moti** (supra)

requires a satisfactory explanation[17]. However, in some other instances, delay of 05 months and 02 years respectively had not prevented the enlargement of time although delay was long and reasons were unsatisfactory but there were merits in the appeal.[18]

[7] Rules of court must, *prima facie*, be obeyed and in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.[19]

[8] The appellant has not explained the reasons for the substantial delay which is over 01year and 04 months in an affidavit or otherwise. As for the prejudice to the respondent, I think if leave to appeal out of time is granted, the respondent being the state would be burdened with defending yet another appeal, if the two appeal grounds proposed by the appellant will not probably succeed. I shall consider the merits of the proposed appeal grounds now.

Is there a ground of appeal that will probably succeed?

[9] Both proposed grounds of appeal complain that the High Court failed to consider the merits of his allegation in his 04th application for constitutional redress which I shall deal with in detail later in this Ruling.

[10] It is trite law that power given to strike out under O.18 r.18 is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances[20], striking out a statement of claim as disclosing no reasonable cause of action is a summary power, which should be exercised only in plain and obvious cases[21], striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear

[17] **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported
[18] **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)
[19] **Ratnam v Cumarasamy** [1964] 3 All E.R. 933
[20] **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch 506
[21] **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094

that the pleading objected to, discloses no arguable case[22] and the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt[23].

[11] The High Court judge had held in his impugned ruling that matters complained of by the appellant in his constitutional redress applications should have been raised and addressed in the High court itself at the appropriate time, if in fact there were any such instances. The court further said that the mere allegations cannot give rise to a cause/s of action for the applicant to invoke the jurisdiction of the High Court under the guise of constitutional redress. However, in my view the appellant more appropriately should have raised the 01st, 02nd and 03rd allegations for constitutional redress in his criminal appeal in the Court of Appeal. Nevertheless, I agree that he could and should have raised a plea of *autrefois convict* with regard to the 04th allegation in the High Court.

[12] The appellant had been charged with the criminal offences of rape and attempted to pervert the cause of justice under the Crimes Act 2009. At the conclusion of the trial on 21 February 2018, the assessors' opinion was unanimous that he was guilty on both counts as charged. The learned trial judge agreed with the assessor's opinion and in his judgment delivered on the same day, convicted the appellant and sentenced him to 08 years with a minimum serving period of 07 years on the charge of rape and 18 months of imprisonment on the charge of attempt to pervert the course of justice; both to run concurrently. The appellant has served his term of imprisonment and is now out of prison.

[13] The Court of Appeal following a single Judge Ruling[24] heard his appeal on 05 May 2023 and the judgment was delivered on 25 May 2023.[25] Therefore, the allegation ('the trial judge failed to inform him of his right to appeal') in the appellant's 01st application for constitutional redress has no validity whatsoever at this stage. His allegation in the 02nd

[22] **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761
[23] Megarry V.C. in **Gleeson v J. Wippell & Co.** [1971] 1 W.L.R. 510 at 518
[24] **Waqaninavatu v State** [2020] FJCA 115; AAU0057.2018 (27 July 2020)
[25] **Waqaninavatu v State** [2023] FJCA 72; AAU57.2018 (25 May 2023)

constitutional redress application ('appellant excluded during summing up') was considered by the Full Court and held that it had no merits. The Full Court also considered the allegation in the appellant's 03rd constitutional redress application (being deprived of a fair trial when the learned trial judge directed the assessors *'You must look at the evidence dispassionately and with wisdom of your experience of the community and the Fijian lifestyle.'* but concluded that it was insufficient to result in miscarriage of justice given the totality of the evidence in the case. The appellant had not taken up a position similar to his allegation in his 04th application for constitutional redress in the Court of Appeal too. However, he had made a different complaint and the Court of Appeal had dealt with it as follows:

> *'[23] In an affidavit [not sworn] but filed in support of the appellant Notice of Appeal on Question of Law Alone dated 27 September 2022, he claims that he was visited by police officers from the Criminal Investigation Department [CID] and they discussed CID HQ PEP 149/13. Arising out of that visit from the Police Officers and the discussion that must have ensued with the appellant, he alleges that not all the information in the police investigation folder at CID HQ was disclosed to him. It must be stated all these claims by the appellant are hearsay and cannot be taken as evidence in this hearing. He claims that section 14(2) of the Constitution as giving him the right to be given the information in the police investigation docket.*
>
> *[24] As regard, section 14(2) (c) of the Constitution, it is a limited right, it confers a right to an accused person to witness statements only. It does not confer right to all information that the police may have collected in the course of the investigation of the case in question. This submission has no merit.'*

[14] In the end, the Court of Appeal dismissed his appeal and he appealed to the Supreme Court. The Supreme Court dismissed both grounds of appeal based on the allegations in the appellant's 02nd and 03rd applications for constitutional redress but his appeal against conviction on lack of competence on the part of his lawyers was remitted to the Court of Appeal for that ground to be considered afresh by a differently constituted Court of Appeal.[26] The appellant had not pursued any ground of appeal in the Supreme Court resembling his complaint in the 04th application for constitutional redress or at least a

[26] **Waqaninavatu v State** [2024] FJSC 58; CAV0038.2023 (30 October 2024)

ground of appeal similar to the one he raised in the Court of Appeal, though he strenuously sought to argue the latter at the hearing before me. However, the appellant's decision not to pursue any of those grounds before the Supreme Court renders his re-agitation the same allegation in the 04th application for constitutional redress before me totally incredible and unsubstantiated. It is based on mere hearsay.

[15] Therefore, I do not see any reason for me to interfere with the striking out of the appellant's summons by the High Court. In addition, I agree with the High Court judge that there was unexplained and unreasonable delay in all his constitutional redress applications and therefore I do not see any exceptional circumstances why the High Court judge should have entertained them after 2 ½ years outside the 60 day period stipulated in Rule 3 of the High Court (Constitutional Redress) Rules 2015. Similarly, I have no reason to interfere with the decision of the High Court judge where he exercised his discretion not to grant relief in relation to the appellant's constitutional redress applications pursuant to section 44 (4) of the Constitution because he had an adequate alternative remedy by way of criminal appeals. The High Court relied on **Singh v Director of Public Prosecutions** [2004] FJCA 37; AAU0037.2003S (16 July 2004) where the court held that the Privy Council has consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused and it has also regarded an application for constitutional relief in the circumstances of the case as an abuse of process and as being subversive of the rule of law which the Constitution is designed to uphold and protect. In fact, as I have already highlighted the appellant has fully exhausted his alternative remedy of appealing to the Court of Appeal and the Supreme Court and succeeded in the Supreme Court in obtaining a re-hearing before the Court of Appeal.

[16] Thus, for the reasons aforesaid I have no hesitation in refusing the appellant's application for leave to appeal out of time.

[17] At the same time, the appellant's application for extension of time to appeal the impugned Ruling (which is a decision as per section 12(1)(a) of the Court of Appeal Act) is not sustainable for another reason. Whenever under the Court of Appeal Rules, an application

may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the court below.[27] The period for filing and serving a notice of appeal or an application for leave to appeal or an application for leave to appeal under Rule 16 may be extended by the court below or by the Court of Appeal.[28]

[18] The power to allow an application for leave to appeal should be exercised subject to Rule 26(3) of the Court of Appeal Rules[29] which is in place to ensure that the would-be appellant in an interlocutory matter must make his first attempt before the judge of the High Court and if he fails, he has a second chance before the Court of Appeal where the single Judge will decide leave applications[30]. An application for a stay of execution, the notice of motion was struck out pursuant to Rule 26 (3) which provides that where there is concurrent jurisdiction exercisable by both the Court of Appeal and the court below, any application that is subject to that concurrent jurisdiction must first be made in the court below and under Rule 34, the Court of Appeal and the court below are granted concurrent jurisdiction in respect of an application for stay.[31] Where the court below and the Court of Appeal enjoy concurrent jurisdiction in respect of an application, the application must first be made to the court below under Rule 26(3) of the Court of Appeal Rules and in the event that the court below (the High Court) refuses the application, it may then be renewed in the Court of Appeal ('renewed application') and pursuant to section 20(1) of the Court of Appeal Act, a judge of the Court of Appeal may exercise the Court's power to grant leave to appeal and to grant a stay of proceedings to prevent prejudice to the claims of a party pending the appeal.[32]

[27] Rule 26(3) the Court of Appeal Rules
[28] Rule 27 of the Court of Appeal Rules
[29] **Vatuwaqa Transport Co Ltd v Transport Control Board** [1994] FJLawRp 36; [1994] 40 FLR 16 (8 February 1994)
[30] **South Sea Cruises Ltd v Mody** [2010] FJCA 74; Misc Action 13.2010 (26 August 2010)
[31] **Palu v Australia and New Zealand Bank** [2013] FJCA 11; Miscellaneous 19.2011 (8 February 2013)
[32] **Wehrenberg v Suluka** [2018] FJCA 112; ABU99.2017 (6 July 2018)

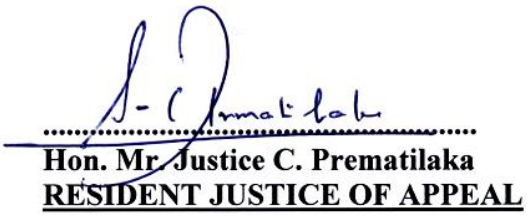
[19] Referring to Rule 34(1) read with 26(3), it has been held[33] (approved later[34] by the President, CA) that:

> *'[6] An application for a stay of execution must be made to the Court below first. If the application is refused by the Court below then a further application may be made to the Court of Appeal. Under s 20 of the Court of Appeal Act Cap 12 a single judge of the Court of Appeal has jurisdiction to hear and determine such an application.'*
>
> *[7] As the Appellant has not yet made an application for stay of execution to the Court below, this Court has no jurisdiction to hear the application at this stage. As a result the Appellant's application for stay of execution is dismissed.'*

[20] Therefore, this court has no jurisdiction to hear the appellant's application, for he had not filed an application for leave to appeal out of time in the High Court in the first instance and it must stand dismissed on that ground too.

Orders of the Court:

1. *Application for leave to appeal out of time (extension of time to appeal) is refused.*
2. *Costs lie where they fall.*



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

Solicitors:

Appellant in person
AG's Chamber for the Respondent

[33] **Chaudhry v Chief Registrar** [2012] FJLawRp 118; (2012) 2 FLR 398 (5 November 2012)
[34] **Veitala v Home Finance Co (trading as HFC Bank)** [2023] FJCA 272; ABU012.2023 (7 December 2023)