

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the Employment Relations Court]**

**CIVIL APPEAL NO. ABU 47 of 2024**  
**[In the Employment Relations Court at Suva Appeal No. ERCA 29 of 2019]**  
**[In the Employment Relations Tribunal at Lautoka ERT No. 20 of 2018]**

**BETWEEN** : **PRANIL DATT** *Appellant*

**AND** : **FIJI SUGAR CORPORATION** *Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant absent and unrepresented**  
**Ms. M. Chowdhury for the Respondent**

**Date of Hearing** : **10 March 2025**

**Date of Ruling** : **13 March 2025**

**RULING**

[1] Messrs. Fazilat Shah Legal had filed summons for leave to appeal out of time (extension of time to appeal) on behalf of the appellant. The respondent represented by Neel Shivam Lawyers had opposed the application by way an affidavit in opposition. The appellant had followed up with an affidavit in reply. Upon solicitors for both parties having filed written submissions the matter was fixed on 27 January 2025 for hearing in the presence of counsel for the appellant and respondent for 10 March 2025.

***Question of jurisdiction***

[2] The appellant's application for extension of time to appeal the impugned judgment (which is a decision as per section 12(1)(a) of the Court of Appeal Act) delivered on 24 January 2024 cannot be maintained for the reason I am going to discuss now.

[3] 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.<sup>1</sup> 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.<sup>2</sup> The qualifying words in Rule 26(3) are '*whenever under these Rules*'. So, Rule 26(3) only applies where the Court of Appeal Rules themselves provide that an application may be made to either court; an example is Rule 34(1) relating to applications for stay pending appeal, the opening words of which are "*Except insofar as the court below or the Court of Appeal may otherwise direct. . .*" In the case of an application under Rule 34(1), Rule 26(3) would require the application to be made first to the High Court.<sup>3</sup> Thus, it is very clear that when the jurisdiction for an extension of time to appeal is vested also in the High Court, an application for leave to appeal out of time must be made in the first instance to the High Court. The appellant has not done so and the respondent's counsel confirmed that there was no such application before the High Court made by the appellant. The appellant on his part has not said so either. Therefore, it is quite reasonable to conclude that the appellant has not indeed invoked the jurisdiction of the High Court seeking leave to appeal the High Court judgment out of time.

[4] The power to allow an application for leave to appeal should be exercised subject to Rule 26(3) of the Court of Appeal Rules<sup>4</sup> 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<sup>5</sup>. 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

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<sup>1</sup> Rule 26(3) the Court of Appeal Rules

<sup>2</sup> Rule 27 of the Court of Appeal Rules

<sup>3</sup> **BDO Spicers Auckland Trustee Company Ltd v Native Land Trust Board** [2003] FJCA 67; ABU0062.2003S (28 November 2003)

<sup>4</sup> **Vatuwaqa Transport Co Ltd v Transport Control Board** [1994] FJLawRp 36; [1994] 40 FLR 16 (8 February 1994)

<sup>5</sup> **South Sea Cruises Ltd v Mody** [2010] FJCA 74; Misc Action 13.2010 (26 August 2010)

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.<sup>6</sup>

[5] 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, on the basis that 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.<sup>7</sup>

[6] Referring to Rule 34(1) read with 26(3), it has been held<sup>8</sup> (approved later<sup>9</sup> 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.’*

[7] Thus, applying Rule 26(3) read with Rule 27 the same principle should apply to applications for extension of time as well which means that in the absence of application for extension of time made to the High Court in the first instance and a refusal thereof by

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<sup>6</sup> **Wehrenberg v Suluka** [2018] FJCA 112; ABU99.2017 (6 July 2018); **Naidu v Medical Superintendent of Lautoka Hospital** [2018] FJCA 236; ABU52.2017 (30 November 2018)

<sup>7</sup> **Palu v Australia and New Zealand Bank** [2013] FJCA 11; Miscellaneous 19.2011 (8 February 2013)

<sup>8</sup> **Chaudhry v Chief Registrar** [2012] FJLawRp 118; (2012) 2 FLR 398 (5 November 2012)

<sup>9</sup> **Veitala v Home Finance Co (trading as HFC Bank)** [2023] FJCA 272; ABU012.2023 (7 December 2023)

the High Court, this court has no jurisdiction to hear the appellant's application under Rule 27 at this stage and it will have to be dismissed.

[8] On a different note, I may also make some observations (though not required to dispose of this application) on leave to appeal against interlocutory orders or interlocutory judgments. With regard to interlocutory orders or interlocutory judgments given by a judge of the High Court, no appeal shall lie without the leave of the judge or of the Court of Appeal<sup>10</sup>. Regarding the reference to '*the judge*' in the phrase '*without the leave of the judge*' in section 12(1)(f), this court has held '*the judge*' to be a judge of the High Court and stated that if a party fails to obtain leave to appeal an interlocutory order or interlocutory judgment in the High Court in the first instance that party has a second chance before the Court of Appeal where the single Judge will decide the leave application<sup>11</sup> and unless there is an application made, heard and adjudicated upon by the High Court Judge and the High Court refuses leave, a single Judge of the Court of Appeal, has no jurisdiction in respect of a leave application<sup>12</sup>. It was once again said that under section 12 (2) (f) leave may be obtained from the judge in the Court below or from the Court of Appeal but pursuant to Rule 26 (3) of the Court of Appeal Rules leave should ordinarily be sought in the first instance from the judge in the court below. If leave is refused, then the application may be renewed in the Court of Appeal.<sup>13</sup>

[9] However, I have some doubts as to whether '*the judge*' in '*without the leave of the judge*' in section 12(1)(f) refers to a judge of the High Court. In my view, '*the judge*' is a reference to a single judge of the Court of Appeal and not the High Court. If I am right, then Rule 26(3) would not apply to leave to appeal applications against interlocutory orders or interlocutory judgments in the High Court which in turn means that a party needs not seek leave to appeal in the first instance in the High Court against interlocutory orders or interlocutory judgments before seeking leave to appeal in the Court of Appeal as opposed

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<sup>10</sup> Section 12(2)(f) of the Court of Appeal Act

<sup>11</sup> **South Sea Cruises Ltd v Mody** (supra)

<sup>12</sup> **Ali v State** [2010] FJCA 76; Misc Action 17.2010 (9 September 2010)

<sup>13</sup> **Lakshman v Estate Management Services Ltd** [2015] FJCA 26; ABU14.2012 (27 February 2015)


to applications for extension of time under Rule 27 and stay of execution applications under Rule 34(1). However, this is a matter to be deliberated by the Full Court in due course. For the time being, I would continue to follow the precedents already in place.

[10] Therefore, this court has no jurisdiction to hear the appellant's application, for he had not filed an application seeking leave to appeal out of time in the High Court in the first instance and not met with a refusal by the High Court. His current application must therefore should stand dismissed.

**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.*



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

**Solicitors:**

Appellant absent and unrepresented  
Neel Shivam Lawyers for the Respondent