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

CIVIL APPEAL NO. ABU 008 of 2024
[Judicial Review No. HBJ 039 of 2023]

BETWEEN : **MANJULA DEVI** trading as **PACIFIC BAKERY & INVESTMENTS** of Nanuka Settlement, Vatuwaqa, Suva in Fiji, Businesswoman.

Appellant
(Original Applicant)

AND : **NAUSORI TOWN COUNCIL** a local body corporate duly constituted under the Local Government Act, Cap 125.

Respondent
(Original Respondent)

Coram : **Prematilaka, RJA**

Counsel : **Mr. P. Sharma for the Appellant**
Mr. K. Goundar for the Respondent

Date of Hearing : **16 June 2025**

Date of Ruling : **20 June 2025**

RULING

[1] The appellant has filed a notice of appeal (06 February 2024) against the Ruling of the High Court dated 11 January 2024[1] where the High Court refused leave for judicial review subject to costs on the basis that the dispute had arisen under contract law and was not subject to public law principles. Later the appellant has paid security for costs of the appeal as directed by the Chief Registrar.

[1] **Devi (trading as Pacific Bakery & Investment) v Nausori Town Council** [2024] FJHC 10; HBJ39.2023 (11 January 2024)

[2] The appellant has then filed 'summons for stay of proceedings' (26 February 2025) supported by an affidavit seeking the following reliefs:

> *'1. An order staying eviction proceedings until the appeal is determined.*
> *2. That an interim stay be granted pending the hearing and determination of this application.*
> *3. That the costs of this application be in the cause.'*

[3] The respondent is opposing the said summon for stay of proceedings.

[4] The facts in brief leading to these proceedings are as follows. The appellant began occupation of 'Bakery Number 1' outside Nausori Market before the written agreement was signed. A formal Tenancy Agreement was executed with the monthly rental being $1,650.00 and a term ending on 31 July 2023. An Addendum to the Tenancy Agreement was executed increasing the monthly rental to $1,815.00 where the tenancy itself was extended to 30 September 2024. The respondent ('NTC') served the 01st Notice to Quit dated 01 November 2023 under Clause 26.1 of the Tenancy Agreement, giving one month for the appellant to vacate by 01 December 2023. The appellant filed a notice of motion on 05 December 2023 for judicial review and stay of the Notice to Quit dated 1 November 2023. The High Court on 11 January 2024 refused leave for judicial review. It had refused the stay of the Quit Notice on 20 December 2023. The appellant's solicitors filed the Notice of Appeal on 06 February 2024. NTC issued a 02nd Notice to Quit (13 August 2024), requiring the appellant to vacate by 13 September 2024 but the appellant remained on the premises. The Addendum to the Tenancy Agreement expired on 30 September 2024. NTC filed its first eviction application in court (HBC 8 of 2025) on 15 January 2025. The appellant filed the current Ex Parte Summons for Stay of Proceedings pending the outcome of the appeal on 26 February 2025. On 11 March 2025, NTC served the 03rd Notice to Quit, advising the appellant that any payments made would not be construed as rent under section 100(2)(b) of the Property Law Act and requiring the appellant to vacate the premises by 11 April 2025. On 01 April 2025, NTC withdrew HBC 8 of 2025, its initial eviction application. Deadline under third Notice to Quit expired and the appellant continued to occupy the premises. NTC filed a fresh eviction application in court being HBC 141 of 2025, relying on the 03rd Notice to Quit.

[5] The appellant's summons for leave for judicial review related only to the 01st Notice to Quit. She is seeking '*an order staying eviction proceedings until the appeal is determined'.* Thus, the order sought is pending the purported appeal in the Court of Appeal.

Is there an appeal on foot? Could there be an appeal against the impugned Ruling?

[6] I raised this question with both counsel at the hearing as none of them had touched upon it up to then. In terms of section 12(2)(f), no appeal shall lie from any interlocutory order or interlocutory judgment without leave of the judge or the Court of Appeal. Section 20(1)(a) empowers a judge of the Court of Appeal to give leave to appeal.

[7] In Fiji, courts have consistently adopted the *'application approach'* which means that it depends on the nature of the application[2], to determine whether an order, ruling or decision (whichever way it is identified) is interlocutory or final[3]. The Court in ***Woodstock Homes (Fiji) Ltd*** advised that the prudent course for practitioners is to assume that where proceedings are commenced in the High Court in the court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory. In case of interlocutory rulings, if leave has not been sought then an appeal should not be permitted to be filed and the Court dismissed the appeal. The Court further stated that at that point the would-be appellant can apply to the Court of Appeal for leave to seek leave to appeal out of time. Some of the examples of interlocutory orders are:

- *'the refusal of an application to set aside a default judgment* ***Atwood v Chichester*** *[1878] UKLawRpKQB 4; (1878) 3 QBD 722;* ***Carr v Finance Co of Australia Ltd*** *[1981] HCA 20; (1981) 34 ALR 449;* ***Woodstock Homes (Fiji) Ltd*** *(supra)*
- *an order staying proceedings:* ***Hall v Nominal Defendant*** *[1966] HCA 36; (1966) 117 CLR 423 at 444;*
- *an order striking out a pleading:* ***Hall v Nominal Defendant*** *(supra);*
- *an order refusing an extension of time in which to commence proceedings:* ***Hall v Nominal Defendant*** *(supra);*

[2] **White v Brunton** (1984) QB 570

[3] See **Woodstock Homes (Fiji) Ltd v Rajesh** [2008] FJCA 104; ABU0081.2006S (18 April 2008); **Khan v Ali** [2014] FJHC 738; HBC21.2013 (14 October 2014)

- *an order refusing leave to appeal:*
- *an order dismissing proceedings for want of prosecution:* ***Shore Buses v Minister for Labour*** *FCA ABU0055 of 1995.*
- *the refusal of the High Court to grant leave for judicial review was an interlocutory order, and the applicants required leave to appeal against it:* **Suresh Chanran v Shan** (below)

[8] In **Suresh Chanran v Shan** (1995) 41 FLR 65[4] the Fiji Court of Appeal expressed its opinion on whether the matter before it (the refusal of the High Court to grant leave for judicial review) was an interlocutory order or a final order. The Court held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts unless there were strong reasons or not doing so and accordingly adopted the 'application approach' and held that the refusal of the High Court to grant leave for judicial review was an interlocutory order, and the applicants required leave to appeal against it. Accordingly, the Court refused the motion and dismissed it. The 'order approach' and 'application approach' according to the Court are:

> '*The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end, it was a final order, if it did not, it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the Court decided the application."*

[9] However in **Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors**[5], a differently constituted Court of Appeal declined to follow ***Suresh Charan*** holding that the 'order approach' suggested for criminal field[6] should be followed. In ***Woodstock Homes (Fiji) Ltd*** it was said that different results will follow when these two tests are applied to a refusal of leave for judicial review in that if ***Suresh Charan*** and the 'application approach' is followed then an order refusing leave to apply for judicial review is an interlocutory matter and if ***Jetpacker Works (Fiji)*** and the 'order approach' is

[4] Followed in **Shore Buses Ltd v Minister for Labour & Industrial Relations** [1996] FJCA 7; Abu0055.95 (15 November 1996)

[5] [2004] FJCA 40; ABU0063.2003 (16 July 2004)

[6] **Nata v State** [2002] FJLawRp 46; [2002] FLR 299 (31 May 2002)

followed then whether such an order is interlocutory would depend on analysing the circumstances of the case.

[10] The Court of Appeal revisited this issue in **Goundar v. Minister for Health**[7] and held that it seems that the 'application approach' is the correct approach for the reasons stated in ***Suresh Charan*** and for the additional reason for legal certainty and applying the principle of 'stare decisis' the approach to be adopted for civil matters is the application approach. The Supreme Court in **Jivaratnam v Prasad** [2023] FJSC 11; CBV0005.2020 (28 April 2023) finally settled the issue beyond doubt by authoritatively stating that:

> ***'[41] In the absence of any statutory assistance to aid the courts in Fiji, this Court is of the view that the "application approach" should be adopted unless there are strong reasons in any particular case for not doing so. As a general guide and rule of thumb, when and where there is doubt if the Order is final or interlocutory, leave should be sought.'***

[11] In the matter before me, the High Court refused leave for judicial review and the matter came to an end. However, if leave for judicial review had been allowed, the matter would have continued[8]. Thus, applying the 'application approach' namely '*The order was treated as final only if the entire cause or matter would be finally determined whichever way the Court decided the application'* one has to necessarily come to the inevitable conclusion that the Ruling refusing leave for judicial review is not final but only interlocutory. Therefore, I have no hesitation in holding that the impugned Ruling dated 11 January 2024 is an interlocutory order and the appellant could not appeal it without the leave of this court. Accordingly, the notice of appeal is null and void ab initio and *pro forma* should be struck out. I am distinguishing the Rulings of Almeida Guneratne, AP[9] that a single judge is bereft of jurisdiction to strike out an appeal formally before the full Court and my own Ruling[10] as the grounds for applications for striking out the appeals or the purported appeals therein

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[7] [2008] FJCA 40; ABU0075.2006S (9 July 2008) - appeal was dismissed

[8] See ***Shore Buses Ltd v Minister for Labour & Industrial Relations***

[9] **P A Lal Coachwork v Lata** [2021] FJCA 247; ABU02.2021 (17 December 2021) & **Santok Investment v Abbco Builders Pte Ltd** [2022] FJCA 191; ABU0044.2021 (30 December 2022)

[10] **Interioz & Exterioz Engineering and Civil Engineering Works Ltd v Aleem** [2025] FJCA 63; ABU011.2023 (17 April 2025)

were different to the matter before me at present. ***Interioz & Exterioz Engineering and Civil Engineering Works Ltd v Aleem*** is scheduled to be taken up before the Full Court for hearing on 09 July 2025.

[12] Therefore, since there is no appeal on foot currently before this court, there cannot be any application or summons seeking *'an order staying eviction proceedings* ***until the appeal is determined***. Consequently, the ex-parte summons for stay of proceedings should also be struck out/ dismissed.

[13] The respondent is seeking costs. However, the respondent's counsel did not raise until this court put this fundamental jurisdictional issue before both counsel at the hearing. If the respondent's counsel had done so soon after the service of summons for stay of proceedings or even before (for example as soon as the notice of appeal was served on the respondent) or even belatedly before the Chief Registrar at the security for costs inquiry, the respondent could have prevented unnecessary costs being incurred for subsequent steps. Therefore, I am not inclined to order costs against the appellant.

[14] This determination is sufficient to dispose of this mater. However, for the sake of completion, I may make a few pertinent remarks on maters raised by the parties on the summons for stay of - presumably the current - eviction proceedings.

Should stay of proceedings be granted?

[15] The respondent has not initiated eviction proceedings against the appellant based on the 01st Notice to Quit which was unsuccessfully challenged in the High Court resulting in the Ruling on 11 January 2024. The only eviction proceedings currently on foot - HBC 141 of 2025 - is based on the 03rd Notice to Quit. Though the appellant had indeed filed another eviction proceedings on 15 January 2025 – HBS 8 0f 2025 (I am not sure which Notice to Quit the respondent relied on *i.e.* the 01st or 02nd), it was withdrawn on 01 April 2025. The appellant does not seem to have challenged both the 02nd and 03rd Notices to Quit by way of judicial review or otherwise. Therefore, the current proceedings for eviction is not based on the 01st Quit Notice as wrongly assumed by the appellant. Mere reference to the 01st and

02nd Notices to Quit in the 03rd Quit Notice does not mean that the pending proceedings for eviction is based on the 01st Quit Notice. Thus, there is no legal footing at all for the appellant to seek stay of current eviction proceedings – HBC 141 of 2025- in the proceedings before me as it originates from the 'notice of appeal' against the Ruling on 11 January 2024 dealing with the 01st Quit Notice.

The effect of Rule 34(1) of the Court of Appeal Rules read with Rule 26(3)

[16] Secondly, the appellant cannot seek stay of proceedings in this court in the first instance without first having sought the same in the High Court pending appeal. I extensively dealt with issue previously[11] and I quote from that Ruling:

> *'[8] Referring to Rule 34(1) read with 26(3), it has been held[12] (approved later[13] 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.'*
>
> *[9] Therefore, the appellant's current application is not a renewed application for stay as it attempts to invoke the original jurisdiction of the Court of Appeal in the first instance without having it heard and refused by the High Court.'*

[17] The appellant has tried to argue that in fact she sought a stay from the High Court but was unsuccessful and the counsel referred me to an Ex-tempore Ruling dated 20 December 2023[14]. It is amply clear that by that application the appellant had sought staying of the 01st

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[11] **Lal v Jamnadas** [2025] FJCA 67; ABU072.2024 (11 April 2025)

[12] **Chaudhry v Chief Registrar** [2012] FJLawRp 118; (2012) 2 FLR 398 (5 November 2012); See also **Samshood v Vunimoli Sawmill Ltd** [2013] FJCA 35; ABU7.2012 (3 May 2013)

[13] **Veitala v Home Finance Co (trading as HFC Bank)** [2023] FJCA 272; ABU012.2023 (7 December 2023)

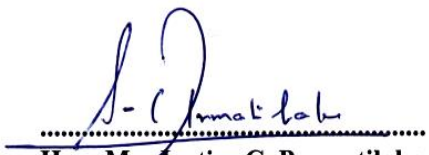
[14] **Devi v Nausori Town Council** [2023] FJHC 914; HBJ39.2023 (20 December 2

Quit Notice (dated 01 November 2023) issued by the respondent pending the High Court decision pertaining to the leave application for judicial review – HBJ 39 of 2023. That application nor the ruling had anything to do with seeking a stay of High Court Ruling dated 11 January 2024 which is the subject matter of the proceedings before me. Thus, on this score as well the appellant's summons for stay of proceedings cannot be sustained and should be struck out.

[18] I shall not make any factual observations on the merits of the so called appeal or the summons for stay of proceedings, for it is not only not required in the light of my conclusions above but it would also be prejudicial to both parties on the pending eviction proceedings HBC 141 of 2025 scheduled to take place on 08 July 2025.

Orders of the Court:

1. Notice of Appeal filed on 06 February 2024 is struck out/dismissed.
2. Ex-parte summons for stay of proceedings filed on 26 February 2025 is struck out/ dismissed.
3. No costs.



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

Solicitors:

Crown Law Lawyers for the Appellant
Kumar Goundar Lawyers for the Respondent