**IN THE COURT OF APPEAL, FIJI**
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL ABU 32 OF 2016**
(High Court HBC 99 of 2011)

**BETWEEN** : **DINESH SHANKAR**

*Appellant*

**AND** : **FNPF INVESTMENTS LIMITED**

*First Respondent*

**AND** : **VENTURE CAPITAL PARTNERS (Fiji) LIMITED**

*Second Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Ms M Rakai for the Appellant**
**Mr D Sharma for the First Respondent**
**No appearance for the Second Respondent**

**Date of Hearing:** **26 January 2017**

**Date of Ruling:** **24 February 2017**

## RULING

[1] In 2011 FNPF Investments Limited (FNPFIL) commenced proceedings in the High Court seeking damages from Dinesh Shankar (Shankar) and Venture Captial Partners (Fiji)

Limited (Venture Capital) claiming damages for investing in ventures that were non-profitable and in violation of the investment management agreement between FNPFIL and Venture Capital. The agreement was terminated in 2010. FNPFIL alleged that it had suffered substantial loss due to the alleged failure of both Shankar and Venture Capital to exercise due diligence as investment managers and due to breaches of the investment management agreement.

[2] FNPFIL is a limited liability company and a subsidiary of FNPF being a body corporate established under the Fiji National Provident Fund Decree 2011 (repealing the Fiji National Provident Fund Act Cap 219).

[3] Shankar is a director of Venture Capital and its principal officer and agent in Fiji. Shankar admitted that he was the liaison between FNPFIL and Venture Capital. Shankar admitted the management agreement and that he signed the agreement as an agent of Venture Capital. The claims against Shankar appear to be in relation to both his capacity as director and in his personal capacity.

[4] Venture Capital filed a statement of defence. Shankar, without filing a statement of defence, filed a summons for an order striking out the claim against him under Order 18 Rule 18 (1) (b) and (d) of the High Court Rules 1988.

[5] In a written decision dated 22 March 2013 the learned High Court Judge concluded that the statement of claim against Shankar was not scandalous or frivolous or an abuse of process. The application to strike out was dismissed and Shankar was ordered to pay to FNPFIL costs fixed at $1,000.00.

[6] Shankar subsequently filed on 4 April 2013 an application for leave to appeal in the High Court pursuant to section 12(2) of the Court of Appeal Act Cap 12 (the Act) and Rule 26(3) of the Court of Appeal Rules (the Rules). After numerous interlocutory proceedings the application was heard on 14 March 2016. In a written Ruling delivered on 29 March 2016 the High Court refused leave to appeal.

[7] As a result the application before this Court is essentially a renewed application for leave to appeal the decision delivered by the High Court on 22 March 2013. However the Summons filed in this Court on 19 April 2016 also seeks an order for an enlargement of time to file an application for leave to appeal. This application is made under Rule 27 of the Rules. The effect of Rule 27 is that any application for an enlargement of time that is filed within the time prescribed in Rule 16 for filing and serving of a notice of appeal may be heard by the court below (i.e. the High Court) otherwise an application must be made to the Court of Appeal.

[8] It must be noted that both Rule 16 and Rule 27 refer to filing and serving a notice of appeal. However neither section refers to an application for leave to appeal. In other words, Rule 16 specifies that a notice of appeal in the case of an appeal from an interlocutory order must be filed and served within 21 days from the date of pronouncement of the order. In the case of a final judgment the time limit is 42 days. An application for an enlargement of time that is filed after the time specified in Rule 16 has expired must be filed in the Court of Appeal.

[9] Section 12(2) of the Court of Appeal Act states that no appeal will lie to the Court of Appeal from an interlocutory order or judgment of the High Court without leave of the court below or the High Court. Since both the court below and the Court of Appeal have concurrent jurisdiction an application for leave to appeal under section 12(2) of the Act must be made first to the court below (i.e. the High Court). If the application for leave is refused then a renewed application may be made to the Court of Appeal. This is the combined effect of section 12(2) of the Act and Rule 26(3) of the Rules.

[10] It would appear that the requirement to obtain leave under section 12(2) of the Act and the wording of Rule 16 in so far as it applies to interlocutory appeals has caused some confusion which has manifested itself in the decision of the Court below in the present proceedings refusing leave to appeal and in an earlier decision of **Habib Bank Limited – v- Raza and Others** (HBC 53 of 2005; 1 November 2013; [2013] FJHC 579). In my

view these two decisions are not consistent with the observations of this Court in **Equity Realtors and Land Developers (Fiji) Ltd –v- Sddanand Sharma** (Misc. 18 of 2009; 27 May 2011 per Marshall JA). In that decision it is clear that the learned Judge accepted that the appellant must file his application for leave to appeal within 21 days under Rule 16 of the Rules.

[11] The two decisions of the High Court, on the other hand, have been decided on the basis that in order to comply with Rule 16 of the Rules the Appellant must have obtained leave to appeal and filed and served a notice of appeal within the 21 days from the date on when the interlocutory order was pronounced. That is a tall order, if for no other reason, because the Appellant does not control the process. The Appellant does not control (a) the date on which the matter is fixed for first mention, (b) compliance with any directions given by the Court to the other side (c) the fixing of the date for the hearing and (d) the time taken to deliver the Ruling. Even after all that has been completed, the Appellant must then file and serve his notice of appeal, if leave is granted, within the same 21 days. These two decisions have the effect of compelling an appellant in default of that requirement to apply to the Court of Appeal for an extension of time to appeal under Rule 27 since, so it is said, the High Court no longer has jurisdiction.

[12] In my view the misunderstanding of the effect of Rule 16 results from a failure to consider section 20(1) of the Act. Section 20(1) provides in (b) that a judge of the Court may exercise the power of the Court to extend the time within which a notice of appeal OR an application for leave to appeal may be given (emphasis added). The power of the Court of Appeal to extend time is derived from section 13 of the Act. The point is that there is a power in the Act to extend the time within which a notice of an application for leave to appeal may be given. The Rules cannot be inconsistent with the Act and the Rules must be applied in a manner that gives effect to the Act. It follows, in my opinion, that in order to give effect to section 20(1)(b) of the Act allowing the Court to extend the time for giving notice of an application for leave to appeal, Rule 16 should be read to mean that the requirement imposed on the Appellant is to file and serve an application for leave to appeal within 21 days from the date of pronouncement of the decision. If that

provision thus read is complied with then the High Court has jurisdiction to hear the application and there is no requirement for the Appellant to apply for an enlargement of time. It may be argued that the application for leave thus filed and served within 21 days also represents an automatic application for an enlargement of time to appeal which would as a matter of course be included in the orders of the judge if leave were granted.

[13] For the sake of clarity it should be added that if an appellant files an application for an enlargement of time to apply for leave to appeal within 21 days, then that application may be heard by the Court below (the High Court). If the application is filed outside the 21 days then the application must be made in the Court of Appeal. It also follows that in either case it is not necessary to seek leave to appeal out of time. Such an application would only be necessary if the appellant failed to comply with the directions given by the judge for filing and serving the notice of appeal once leave had been granted.

[14] As a result it is not necessary for the Appellant in these proceedings to seek an enlargement of time in this Court. Since the Appellant already has *"one foot in the door"* by virtue of his applying for leave to appeal within time, the only issue is whether the renewed application for leave to appeal should be granted. Perhaps it should also be noted that, although leave to appeal was refused by the Court below, the application was not determined on its merits but on a technical interpretation of the Rules of the Court of Appeal.

[15] The application for leave was supported by an affidavit sworn on 19 April 2010 by Leighton Turner. The application was opposed. The Respondent filed an answering affidavit sworn on 28 June 2016 by Shalvin Maharaj. The Appellant filed a brief reply affidavit sworn on 5 July 2016 by Dinesh Shankar. The Appellant filed a further affidavit sworn on 1 August 20106 by Dinesh Shankar. Consequently the Respondent filed a further answering affidavit sworn on 24 August 2016 by Shalvin Maharaj. The parties filed written submissions prior to the hearing.

[16] The principles to be applied for granted leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only by shown to be wrong but it must also be shown that an injustice would flow if the impugned decision was allowed to stand (**Niemann –v- Electronic Industries Ltd** [1978] VR 431). See: **Hussein –v- National Bank of Fiji** [1995] 41 Fiji LR 130. In the present proceedings the learned High Court Judge dismissed the striking out application made by Shankar under Order 18 Rule 18(1). The decision did not affect the substantive rights of either party. Its effect was to enable FNPFIL to proceed with its action in the High Court and to allow Shankar and Venture Capital to defend the claim made by FNPFIL.

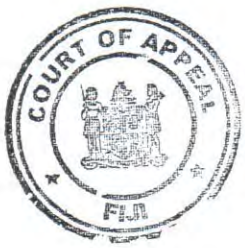
[17] In submissions filed in this Court on behalf of Shankar it is claimed that an injustice will be done if the interlocutory decision is allowed to stand. Counsel submitted that Shankar was one of three directors of Venture Capital but was the only director joined as a defendant. The answer to that submission is that it was always open to Shankar to join the other two directors as third parties under Order 16 of the High Court Rules. It would then be open to FNPFIL to apply to join the third parties as defendants under Order 15 of the High Court Rules. Counsel also submitted that the immunity clause in the Investment Management Agreement was a sufficient basis for striking out the claim. However, that is a matter that should be pleaded in the Defence and its application to Shankar be determined at trial. Finally, Counsel submitted that in the Management Agreement Venture Capital was defined as the manager and that Shankar could not be held liable for losses suffered by FNPFIL. As was submitted by Counsel for FNPFIL, the affidavit material revealed Shankar's role both in securing the agreement between the parties and his role within Venture Capital. The issue was a matter for pleadings, evidence and determination by the trial judge.

[18] I have concluded that there is no basis for granting leave to appeal the interlocutory order and the action should proceed expeditiously to trial in accordance with the Rules.

[19] There was a second application before the Court. FNPFIL applied by summons dated 30 June 2016 for an order that Fiji National Provident Fund be substituted as the First Respondent in place of FNPFIL. This application was opposed. The parties filed affidavit material and written submissions prior to the hearing. During the course of oral submissions Counsel for FNPFIL sought to withdraw the application. The application was not opposed on the basis that FNPFIL pay costs wasted. Costs were fixed at $750.00.

*Orders:*

1. *The application filed by the First Respondent is marked withdrawn.*
2. *The First Respondent is ordered to pay costs to the Appellant in the sum of $750.00 within 14 days from the date of this Ruling.*
3. *The application for leave to appeal filed by the Appellant is dismissed.*
4. *The Appellant is ordered to pay costs to the First Respondent in the sum of $1,500.00 within 14 days from the date of this Ruling.*




W. Calanchini

Hon. Mr. Justice W. D. Calanchini
**PRESIDENT, COURT OF APPEAL**