

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

**CIVIL APPEAL NO. ABU 023 of 2022**  
**[In the Lautoka High Court Action No. 61 of 2013]**

**BETWEEN** : **ROTOMOULD (FIJI) LIMITED** of Aliz Pacific, 8<sup>th</sup> Floor, BSP Life Centre, 3 Scott, Suva in the Republic of Fiji.

***Appellant***

**AND** : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED** of 11 Industrial subdivision, Denarau Island, Nadi in the Republic of Fiji.

***Respondent***

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

**Counsel** : **Ms. N. Devi for the Appellant**  
**Mr. A. K. Narayan (Jnr) for the Respondent**

**Date of Hearing** : **14 August 2025**

**Date of Ruling** : **05 September 2025**

## **RULING**

[1] The current application before this court has been made by way of summons filed by the respondent on 04 December 2024 for *stay of proceedings in the appeal before the Court of Appeal* pending the hearing and determination of the petition for special leave to appeal<sup>1</sup>

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<sup>1</sup> Law Revision Commission has deleted references to ‘Special’ in section 7 of the Supreme Court Act and section 98(4) of the Constitution does not require ‘special leave’ but only leave to appeal.

to the Supreme Court against the Ruling of a single Judge of the Court of Appeal on 4 October 2024 where he had allowed the appellant extension of time to appeal against the judgment of the High Court dated 17 November 2015. The summons has been filed pursuant to section 20 of the Court of Appeal Act ('CA Act'), section 8 of the Supreme Court Act ('SC Act') and the inherent jurisdiction of the Court of Appeal.

[2] The single Judge has set out the background to his Ruling on 04 October 2024 as follows:

*[3] The Applicant is in the business of making plastic water tank products. In and around 2010 – 2011, the Applicant entered into a building construction contract after a tender process with the Respondent. The tender was worth \$655,059.52. A dispute between the parties arose on the delay and the Applicant terminated the contract around 2013.*

*[4] The parties referred the dispute to an arbitrator as provided for under the terms of the contract. A Mr Frazer Clark who had knowledge of the industry, was identified and appointed on 5 March 2012 by mutual agreement. Submissions by both parties were made to the arbitrator and almost a year later, an Award was handed down on 20 February 2013 the arbitrator, in favour of the Respondent in the sum of \$127,819.31.*

*[5] The Applicant, aggrieved by the award, filed on 12 April, 2013 an Originating Summons in the Lautoka High Court to set aside the arbitrators award. In the meantime, the Respondent was filing a petition to wind up the Applicant for non-payment of the judgment sum.*

*[6] The application to set aside the award were based principally on the arbitrator going beyond his mandate, taking account of irrelevant considerations and not taking into account relevant considerations, and the long and unnecessary delay in handing down the award.*

*[7] The High Court's Ruling did not set aside the award. It instead remitted the matter back to the Arbitrator but only in respect of specific matters stated under paragraph 80 (release of material and prefabricated steel to the Applicant) and paragraphs 81 – 82 (whether the Arbitrator has exceeded his jurisdiction).'*

[3] The appellant sought leave to appeal against the High Court decision dated 17 November 2015 and the High Court itself granted leave to appeal on 29 September 2016<sup>2</sup>. The notice of appeal was accordingly filed - appeal number ABU 114 of 2016. In the meantime, the High Court released the judgment sum of \$127,819.31 deposited in court to the respondent on 22 January 2018. The appeal ABU 114 of 2016 was deemed abandoned on 16 August 2019 due to non-compliance with Court of Appeal (CA) Rule 18(5) read with CA Rule 18(10). The appellant then sought enlargement of time to appeal the HC decision dated 17 November 2015, which was granted by a single Judge of this court on or about 03 December 2021. Accordingly, the appellant lodged a fresh notice of appeal on or about 30 December 2021 - appeal number ABU 70 of 2019. This appeal too was deemed abandoned on 25 January 2022 due to non-compliance with CA Rule 17(1) read with CA Rule 17(2). The current appeal – ABU 23 OF 2022 was filed subsequent to the ruling of the single Judge of this court on 04 October 2024 upon considering yet another application for extension of time by the appellant. In effect this is the third appeal against the HC decision dated 17 November 2015.

[4] The appellant submits that the respondent's application for stay pending the determination of the special leave to appeal application to the Supreme Court is flawed because of the restriction placed by section 12 (2) (a) of the Court of Appeal Act which does not permit an appeal from an order allowing an extension of time to appeal a decision. I do not agree, for the single Judge's decision was an order allowing the appellant an extension of time to appeal against the decision of the High Court on 17 November 2015. Section 12(2)(a) deals with an order granted by the HC and no appeal lies to the Court of Appeal against such an order. Section 12(2)(a) or for that matter section 12 generally only deals with the right of appeal from the High Court to the Court of Appeal and not orders, rulings or judgments of the Court of Appeal. It does not deal with any application for leave to appeal to the Supreme Court against an order, a judgment or a ruling of the Court of Appeal.

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<sup>2</sup> **Rotomould (Fiji) Ltd v Deo Construction Development Company Ltd** [2016] FJHC 871; HBC61.2013 (29 September 2016)

- [5] The appellant also argues that section 20 of the CA Act deals with powers of a single Judge of appeal but it does not provide any power to grant a stay of an appeal or application pending in the Supreme Court; such a power is not available in section 20 of the CA Act as the reference to ‘appeal’ in section 20 are references to appeals in the CA and not to appeals in the SC. I agree that orders under section 20 only refers to leave to appeal, appeal, and extension of time to appeal or seek leave to appeal out of time, and matters incidental to such proceedings or intended appeals from the High Court which are already on foot in the Court of Appeal in any of the ways above said; but not any proceedings in the Supreme Court. However, the respondent does not seek stay of proceedings in the Supreme Court. It seeks to have the proceedings in the appeal currently pending before this court stayed pending the Supreme Court proceedings into the respondent’s leave to appeal application against the single Judge’s ruling on 04 October 2024.
- [6] The appellant admits that section 8 of the SC Act allows a single Judge of the Court of Appeal to make such orders in respect of any appeal pending before the Supreme Court but contends that section 8 of the SC Act does not allow a single Judge of this court to stay the proceedings in the appeal before the Court of Appeal pending the leave to appeal application currently in the SC as it is not yet an ‘appeal’ pending before the Supreme Court.
- [7] Although, section 8 refers to any ‘appeal’ pending before the SC, in terms of section 98(4) of the Constitution read with section 7 of the SC Act and Supreme Court (SC) Rule 4 of the Supreme Court Rules, it is reasonably and logically arguable that any appeal pending before the SC should mean or at least include an application for leave to appeal, for there is no direct appeal to the SC from the CA. Section 7 of the SC Act requires the SC to consider both leave to appeal and/or appeal simultaneously.
- [8] There is authority for the proposition that a single judge of the SC may determine an application for a stay pending the determination of a petition for leave to appeal to the

Supreme Court pursuant to section 11 of the Supreme Court Act<sup>3</sup>. However, it has been held that in terms of section 8 of the SC Act, a single judge of the Court of Appeal sitting as a justice of appeal in the Court of Appeal (not as a justice of appeal sitting in the SC) has no jurisdiction to hear and determine an application for a stay of *execution* of a Court of Appeal *judgment* pending an appeal to the Supreme Court<sup>4</sup> in that any application for any interlocutory relief pending the determination of any petition in the SC must be determined by a justice of appeal sitting as a SC judge under section 8 or by a substantive judge of the SC under section 11 of the SC Act. It was also held in **Shayana and Jayesh Holdings Ltd v BP South-West Pacific Ltd** (see footnote 4) that there is no provision in the CA Act, the CA Rule or any other written law that confers on the CA a jurisdiction to grant a stay of execution of its judgment pending an appeal to the Supreme Court and if the CA does not have that jurisdiction then it must follow that a single judge of the Court does not have that jurisdiction - section 20(1) of the CA Act. On this construction of section 8 of the SC Act, the respondent's application for stay of the appeal ABU 023 of 2022 could be considered only by a justice of appeal of the CA sitting as a SC judge under section 8 or by a substantive judge of the Supreme Court under section 11 of the Supreme Court Act. In considering the respondent's application I am sitting in neither of those capacities.

[9] The distinguishing feature in the current application is that the respondent does not seek to have the *execution* of any *judgment* of the CA pending the hearing of the leave to appeal application in the SC. There is currently no judgment of the CA to be executed anyway and what the respondent seeks is to stay of proceedings in the appeal pending for hearing and determination by the CA. Essentially, the respondent's application is to get a single Judge to stop the hearing and determination of the appeal by the CA. However, this distinction, in my view, does not alter the reasoning in ***Shayana and Jayesh Holdings Ltd v BP South-West Pacific Ltd***. This brings me to the other issues.

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<sup>3</sup> See **Stephen Patrick Ward –v- Yogesh Chandra** (unreported CBV 10 of 2010; 20 April 2011) and the ruling in footnote 4.

<sup>4</sup> **Shayana and Jayesh Holdings Ltd v BP South-West Pacific Ltd** [2014] FJCA 141; ABU58.2012 (5 September 2014) followed in **Millemarin Investment Limited v The DPP and Suleiman Abusaidovich Kerimov** ABU 0024 of 2022 (01 June 2022) (HBM 57 of 2022)

[10] The question is whether a single Judge has power to do consider the respondent's application in terms of section 20 (1) (e) –second limb, (j) and (k) of the CA Act. I do not agree that powers under any of these sections either singularly or collectively could be extended or stretched so far as to include staying the hearing and determination of the appeal by the CA pending the leave to appeal application before the SC. It has been held that the phrase '*that is incidental to an appeal or intended appeal*' should be narrowly interpreted<sup>5</sup>.

[11] The single Judge's ruling on 04 October 2024 granting extension of time to appeal cannot be regarded as incidental to the appeal before this court. It is the very foundation of the appeal, for without the ruling on 04 October 2024 there cannot be an appeal. The stay of the hearing and determination of the appeal is also not incidental to the appeal on foot which is the direct result of the ruling on 04 October 2024. Such a course of action would defeat and nullify the ruling made by the single Judge of this court granting extension of time to appeal to the appellant. It will do more. It would restrain the CA from hearing and determining the appeal itself. No provision under section 20(1) of the CA Act does empower a single Judge of this court to either defeat, nullify or make ineffective a ruling of a single Judge granting leave to appeal or extension of time to appeal/leave to appeal or hamstring the CA from hearing and determining the appeal. Moreover, such a stay of the hearing and determination of the appeal is also not incidental to '*stay of execution or make an interim order to prevent prejudice to the claims of any party pending an appeal*'. The respondent has not satisfied me of '*prejudice*' pending the appeal either. In any event, the right to appeal is not a common law right but one derived from statute, the right to a stay of execution pending appeal is not a common law right but one that must be derived from statute<sup>6</sup>. Hence, the respondent's application has no footing in 'inherent jurisdiction' of this Court as well.

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<sup>5</sup> Vanualevu Hardware (Fiji) Ltd v Labasa Town Council [2022] FJCA 59; ABU0019.2018 (27 May 2022)

<sup>6</sup> See Shayana and Jayesh Holdings Ltd v BP South-West Pacific Ltd

[12] **Hans v Deo**<sup>7</sup> raised a question of jurisdiction of a single Judge of the Court of Appeal to grant “a stay order” under and in terms of section 20(1) of the CA Act where:

- (a) leave to appeal against a decision of the High Court has been granted by the single Judge to the full Court; and*
- (b) against which ruling of the single Judge a special leave to appeal application has been preferred to the Supreme Court.’*

[13] Dr. Almeida Guneratne, JA in **Hans** considered section 20(1)(e), (k) of the CA Act and section 8 of the SC Act and said that having earlier granted leave to appeal, a single Judge is bereft of jurisdiction under section 20(1)(e) or (k) of the CA Act on aggrieved party’s application to stay proceedings which are on foot before CA or SC. Dr. Guneratne, JA said:

*‘Whenever a Single Judge of the Court of Appeal had granted leave to appeal against any Ruling of it to the Full Court of Appeal then:*

- (i) (as the first limb) a Single Judge would stand bereft of jurisdiction to grant a stay of hearing of the appeal by the Full Court.*
- (ii) (as an addition limb), if an aggrieved party by such Ruling has invoked the jurisdiction of their Lordship’s Court of the Supreme Court, for that reason also a single Judge would be bereft of such jurisdiction.’*

[14] Therefore, I conclude that I as a single Judge of this Court have no jurisdiction to consider the respondent’s summons for stay pending appeal in ABU 023 of 2022 and make orders prayed for.

[15] In view of my decision on jurisdiction, I am not required to consider the traditional grounds<sup>8</sup> upon which stay of proceedings are allowed.

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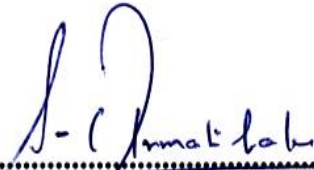
<sup>7</sup> **Hans v Deo** [2021] FJCA 48; ABU144.2018 (22 February 2021)

<sup>8</sup> **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU 11 of 2004 [18 March 2005]; **Singh v Singh** [2019] FJCA 165; ABU 49 of 2018 (16 August 2019); **Prasad v Sagayam** [2019] FJCA 15; ABU82.2018 (22 February 2019); **Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd** [2019] FJCA 174; ABU39.2018 (11 September 2019); **Newworld Ltd v Vanualevu Hardware (Fiji) Ltd** [2015] FJCA 172; ABU76.2015 (17 December 2015); **Gallagher v Newham** [2003] FJCA 18; ABU0030.2000S (16 May 2003); **Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd** [2019] FJCA 174; ABU39.2018 (11 September 2019) and **Attorney-General of Fiji and Ministry of Health v Dre** [2011] FJCA 11; Misc. 13 of 2010 (17 February 2011)

**Orders of the Court:**

1. *Summons for stay pending appeal dated 04 December 2024 is dismissed.*
2. *Respondent is directed to pay costs of \$2500 to the appellant within 21 days hereof.*



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

**Solicitors:**

Parshotam Lawyers for the Appellant  
Shelvin Singh Lawyers for the Respondent