

IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Family at Lautoka

FAMILY APPEAL ABU NO. 0084 OF 2023
[Family Appeal No. 05 of 2022]

BETWEEN

NAAZ

Appellant

AND

SABIR

Respondent

Coram

**Prematilaka, RJA
Morgan, JA
Clark, JA**

Counsel

**Mr. A J Singh for the Appellant
Ms. R Chand for the Respondent**

Date of Hearing : 02 February 2026

Date of Judgment : 27 February 2026

JUDGMENT

Introduction

[1] The primary issue raised by this appeal concerns the jurisdiction of this Court to hear an appeal filed without leave. A brief summary of the background provides context. It is noted at the outset that the factual summary that follows is substantially taken from the High Court judgment The Record prepared for the Court of Appeal hearing was seriously deficient in many respects. There was a failure to include evidence, transcripts, judgments and other documents that ought to have been included. However,

because of the way the hearing proceeded no prejudice to the parties or the hearing itself arose from the deficient Record. We make the point that r 18 of the Court of Appeal Rules 1949 details what is to be included in the record on appeal, responsibility for which lies with the appellant. Further, non-compliance with any provision of r 18 may lead to an appeal being deemed to be abandoned.¹

- [2] The appellant and respondent married in 2014 and separated in July 2016. Their son was born in October 2016. He lived with the appellant, his mother. In May 2018, so called “consent orders” were granted whereby the son was to live with the respondent (the father) and to have contact with his mother for 3-4 hours on Sundays and at other times by agreement. We say “so called” consent orders because the mother subsequently challenged the orders on the basis her consent was obtained by trickery and fraud. She was breast feeding at the time the orders were made and said she would hardly have consented to orders that led to her son’s removal from her in the circumstances.
- [3] In June 2018 the orders were varied to allow the mother to have contact with her son for the purpose of breastfeeding. In October they were further varied to allow weekend stays with the mother from Friday evening to Sunday evening. In November 2019 the mother applied to set aside the consent orders. In March 2022 the Magistrate ruled on the application. The orders were set aside. Residence was granted to the mother with the father having contact every other weekend. The father was ordered to pay child and spousal maintenance.
- [4] The father’s appeal was heard in July 2023. In a Judgment delivered in August 2023, the Magistrate’s orders were discharged.² In their place a series of orders was made giving the parents equal residence and contact rights.
- [5] The mother filed a notice of appeal in September 2023. She also sought dispensation from paying security for costs and filed an application for a stay. An interim stay pending full argument was granted in December 2023. In June 2024 Jitoko P ordered

¹ Court of Appeal Rules 1949, r 18(10).

² *Saabir v Naaz* [2023] FJHCFD 10; Family Appeal 5 of 2022 (30 August 2023).

a stay of the High Court judgment pending determination of the appeal to the Court of Appeal.

[6] On 20 and 21 January 2026, a fortnight or so before the scheduled hearing of this appeal, the appellant filed the following documents:

[a] an application to extend time for filing leave to appeal to the Court of Appeal;

[b] an application for orders:

[i] adjourning the hearing of the appeal;

[ii] appointing counsel for the child;

[iii] requiring the appellant to give undertakings as to filing a full Record and paying the reasonable fees of a representative for the child;

[c] affidavits in support.

The Court of Appeal hearing on 2 February 2026

[7] At the outset appellant's counsel, Mr Singh, recognised and apologised for the failure to obtain leave. He had spoken to counsel for the respondent and offered costs of \$1000. Mr Singh did not refute that respondent's counsel had informed him of the leave requirement and had been informing him for some time of the need to seek an enlargement of time from the High Court.

[8] Addressing the statutory requirements in the Court of Appeal Act 1949, the Family Court Act 2003 and the Rules made under those Acts, Mr Singh categorised them as procedural. The more important concern was the interests of justice. Mr Singh submitted the Court must consider the prejudice the child might suffer. As well, he contended the appeal itself had a real prospect of success.

[9] The concern was that the child is said to be unhappy about the fact that when staying with his father, his paternal grandfather kisses him on the lips. The child does not like

it. When asked why the kissing allegation was not before the High Court Mr Singh answered that the allegation arose after the High Court decision. We note that affidavits sworn by the appellant and respondent in October and November 2023 refer to this allegation.

Court of Appeal’s appellate jurisdiction

[10] The Court of Appeal has only the powers and jurisdiction conferred on it by the Court of Appeal Act. Under s 3(2) the Court may hear all appeals which lie to it by virtue of the Constitution of the Republic of Fiji, the Court of Appeal Act or any other law in force. Appeals lie to the Court of Appeal “as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court”: s 3(3).

[11] Where, as in this case, the appeal is from an appellate decision of the Family Division of the High Court, further statutory provisions are engaged.

[12] Section 19 of the Family Court Act 2003 provides:

Appeals from the Family Division

19

...

- (3) Appeals from Judges of the Family Division sitting on appeal from orders of the Magistrates Court lie to the Court of Appeal *with leave of the Court of Appeal*.

[Emphasis added]

[13] In addition to the leave requirement in the Family Court Act, the Court of Appeal Act places a limitation on appeals from the appellate jurisdiction of the High Court. Section 12 of the Court of Appeal Act provides:

- 12 (1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal –

...

- (c) on any ground of appeal *which involves a question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction*

under any enactment which does not prohibit a further appeal to the Court of Appeal.

[Emphasis added]

- [14] No time within which to apply for leave is specified in s 19(3) of the Family Court Act. Instead, the more general provisions in the Court of Appeal Rules apply. As the Court of Appeal recently decided in *Qalubau v Johnson*, r 15(4) of the Court of Appeal Rules, in conjunction with r 16 of those Rules, requires every application for leave to appeal to be filed and served within a period of 21 days (if appealing an interlocutory order) or six weeks in every other case. The period is calculated from the date on which the judgment, or order of the Court below, was pronounced.³
- [15] In *Estate of Maung Maung Mon v Win Shein* the learned single Judge considered several Court of Appeal authorities on the provisions governing leave to appeal following which His Honour struck out the notice of appeal before him and the application for leave to appeal.⁴ Although the appellant had filed the appeal well after time had expired and no extension had been sought, the single Judge addressed the possibility of seeking an enlargement of time within which to appeal and the forum in which such an application should be made.
- [16] His Honour ruled that, if the appellant so decided, he should first seek an enlargement of time in the High Court in accordance with rr 26(3) and 27 of the Court of Appeal Rules. Rule 27 allows an extension to the period within which an appeal or application for leave to appeal must be filed. The period may be extended either by the Court below or the Court of Appeal. Crucially, r 26(3) requires that wherever under the Court of Appeal Rules an application may be made either to the Court below or the Court of Appeal, it “*shall in the first instance be made to the court below*”.
- [17] The statutory pre-requisites for appeals to the Court of Appeal are not new. In this Court’s frequent engagements with counsel who seek to be heard on appeals for which the necessary leave has not been sought, the response is often that the statutory requirements were overlooked or they are inapplicable. We would hope to see counsel

³ *Isoa Dibulubulu Qalubau v Laiza Magdalane Johnson* [FJCA] 110; ABU023.2024 (25 July 2025).

⁴ *Estate of Maung Maung Mon v Win Shein* ABU109.2024[2025] FJCA134 (25 August 2025).

assuming greater responsibility for their client's interests by ensuring that all requirements for the filing and efficient disposition of appeals are met.

[18] While the appellant filed an application in this Court for an extension of time the application needed to be filed in the Court below.⁵ Further, in the event the appellant pursues that avenue, she must ensure the appeal involves a question of law only.⁶

Concluding Observations

[19] Given this Court's lack of jurisdiction to entertain the appeal, the notice of appeal and late application for leave to appeal must be struck out.

[20] The appellant has the option of pursuing the proper appellate process outlined above or, if there are concerns about the child's welfare, initiating appropriate proceedings in the Magistrates Court and seeking reports and representation for the child. These are matters for the appellant to decide. We note, however, Ms Chand's intention to work through the issues with Mr Singh who, she advised, had discussed such a possibility immediately prior to this hearing.

[21] Finally, Ms Chand sought costs in the sum of \$4000. Ms Chand submitted she had been writing to Mr Singh's office continuously to inquire about progress with the appeal. When she received no response Ms Chand made inquiries of the registry.

[22] It seems apparent to us from the Court file that there has been a lack of proper attention to the pre-requisites for an appeal, especially when they had been brought to Mr Singh's attention, and a lack of diligence in preparing for this hearing for which a full court was constituted only to strike out the notice of appeal. Our award of costs reflects those unsatisfactory aspects of the appellant's approach to the appeal.

[23] Finally, in keeping with the approach in the Family Division in the High Court we have anonymised the parties' names to protect their identity.


⁵ See r26 (3) above, at [16]

⁶ See r 12(1)(c) above at [13].

Orders of the Court:

- (1) *Notice of appeal filed 15 September 2023 is struck out.*
- (2) *Summons for order for adjournment filed 21 January 2026 is dismissed.*
- (3) *Summons for order extending time in which to appeal filed 20 January 2026 is dismissed.*
- (4) *Appellant must pay to the respondent costs in the sum of \$4000 within 21 days hereof.*





Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL



Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL