

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 155 of 2009
(On Appeal from Lautoka High Court
Civil Action No. HBC 155 of 2009)

BETWEEN : **BRETT WHITTAKER** and **LOUISE WHITTAKER**
APPLICANTS
(ORIGINAL PLAINTIFFS)

AND : **BANK OF THE SOUTH PACIFIC LIMITED**
RESPONDENT
(ORIGINAL DEFENDANT)

Appearances : Mr J. Jacobs with Ms B. Doton for the applicants/original plaintiffs
Mr J. Apted for the respondent/original defendant

Date of Hearing : 09 May 2018

Date of Ruling : 20 July 2018

R U L I N G

[on leave to appeal]

Introduction

[01] This is an application for leave to appeal.

[02] By summons dated 26 March 2018 and filed 22 March 2018, (*the application*) the plaintiffs/applicants seek leave to appeal my ruling delivered on 28 February 2018, refusing leave to appeal the Learned Master's decision made on 16 December 2016, dismissing the plaintiffs' action for suppressing certain documents and failing to produce for inspection as ordered by the Court in an application for specific discovery made by the defendant.

- [03] The application is made pursuant to s.12 (2) (f) of the Court of Appeal Act 1949 ('CAA'), RR 26 and 27 of the Court of Appeal Rules ('CAR') and Order 3, Rule 4 of the High Court Rules 1988, as amended ('HCR').
- [04] The CAA, section 12 (2) (f) deals with the requirement to seek leave for interlocutory appeals while R 26 (3) provides that where an application can be made either to the High Court or to the Court of Appeal, it must first be made to the High Court. The High Court Rules O 3, R 4 deals with the High Court's power to extend time under the High Court Rule.
- [05] The defendant/respondent (*'the respondent'*) opposes the application.

The Issue

- [06] One of the threshold questions raised by the Court was whether any leave was required to make a second or renewed application to the Court of Appeal when the Court below refuses leave to appeal.
- [07] I invited both parties to address this threshold issue. None of the parties, it seems to me, had addressed this issue.

The Submissions

Applicants

- [08] The applicants submit that there are arguable issues of some importance which calls for further arguments from both sides leading to an authoritative decision of the Court of Appeal and that the existence of the arguable issues demonstrates that the test in *Rotomould (Fiji) Ltd* [2006] FJHC 871 at [19] and in *Fiji Public Service Commission* [FCA Civil Appeal No. 11 of 1989 at 5). Therefore, they submit, leave to appeal my decision of 28 February 2018, refusing leave to appeal.

Respondent

- [09] The respondent's argument, on the other hand, was that the judgment is an interlocutory judgment and requires leave to appeal (They cite s.12 (2) (f) of the CAA and *Goundar v Minister of Health* [2008] FJCA 40; ABU0075.2006S (9 July 2008). They also submit that an application for leave to appeal against an interlocutory judgment must be filed and served within the 21 day-period allowed for filing a notice of appeal against such a judgment (They rely on R 16 of the CAR and *Equity Realtors and Land Developers (Fiji) Ltd v Sharma* [2011] FJCA

34; MA 18.09 (27 May 2011); *Habib Bank Ltd v Ali's Civil Engineering Ltd* [2015] FJCA 47; ABU 7.2014 (20 March 2015) and *Shankar v FNPF Investments Ltd* [2017] FJCA 26; ABU 32.2016 (24 February 2017)). They further submit that the High Court has no power under the CAA or the CAR to extend the time to file and serve an application or leave to appeal after the time to file a notice of appeal has expired; that power has been given only to the Court of Appeal. (Reliance is placed on (s.20 (1) (6) of the CAA, R 27 of the CAR and *Shankar v FNPF Investments Ltd* [2017] FJCA 26; ABU32.2016 (24 February 2017)).

- [10] In Civil Appeal ABU 99 of 2017 *Fredd Wehrenberg v Sekaia Suluka & Ors* Being interlocutory orders, leave to appeal to the Court of Appeal was required from either the court below (i.e. the High Court) or from the Court of Appeal pursuant to section 12(2) of the Court of Appeal Act 1949 (the Act). 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 (the Rules). In the event that the court below (the High Court) refused the application, it may then be renewed in the Court of Appeal. Pursuant to section 20(1) of the 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.
- [11] In the present case, an application for leave to appeal was made in the court below. The application was refused by the High Court in a ruling on 3 August 2017 and the appellant was ordered to pay \$750.00 costs to the respondents. It appears not to be in dispute that the application in the High Court for leave to appeal had been filed and served within the 21 days for doing so under Rule 16 of the Court of Appeal Rules. The appellant has acted promptly when he filed his renewed application for leave to appeal in the Court of Appeal on 16 August 2017.

The Decision

- [12] In this ruling, I will concentrate on the threshold question of whether leave is required to appeal a decision made refusing leave to appeal.
- [13] It will be noted that there is no right of appeal against a decision granting leave to appeal.

- [14] A question then arises as to whether there is a right of appeal against an order refusing to grant leave to appeal. I would answer the question in the negative. The reason is as follows:-
- [15] The CAA, s. 12 (2) (f), states that no appeal shall lie [...] without leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court [...].
- [16] The CAR, R 26 (3), explains how applications to the Court of Appeal are to be made. It says wherever under these 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. Therefore, it is seen that where the High Court refuses an application for leave to appeal, a further application for leave may be made to the Court of Appeal.
- [17] Hon. Mr Justice Calanchini, President of the Court of Appeal, in a recent judgment in the case of *Fred Wehrenberg v Sekaia Suluka & Ors, Commissioner of Police, AG and Minister for Justice* (Civil Appeal ABU 99 of 2017), said this (at para 5):

“Being interlocutory orders, leave to appeal to the Court of Appeal was required from either the court below (i.e. the High Court) or from the Court of Appeal pursuant to section 12 (2) of the Court of Appeal Act 1949 (the Act). 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 (the Rules). In the event that the court below (the High Court) refuses the application, it may be then renewed in the Court of Appeal. Pursuant to section 20 (1) of the 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.”

Conclusion

- [18] I conclude, for the reasons set out above, that there is no right of appeal against a decision made granting leave to appeal. In the same way, there is no right of appeal against the decision refusing to leave to appeal. When the court below (the High Court) refuses leave to appeal, the applicant may make his or her

renewed or second or further application to the Court of Appeal pursuant to R 26 (3) of the CAR. Such an application can be made without leave of the court below (the High Court) which refused leave to appeal. In other words, leave is not required to make a further application for leave to appeal to the Court of Appeal, where the High Court refuses leave to appeal. Therefore, this application is a misconceived one. Accordingly, I dismiss and strike out the application with summarily assessed costs of \$700.00 payable to the respondent by the applicants within 21 days.

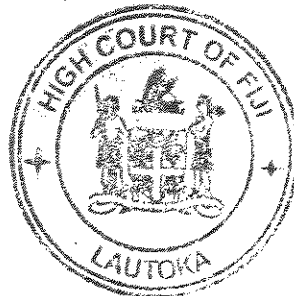
The Result

1. Application dismissed.
2. The applicants shall pay summarily assessed costs of \$700.00 to the respondent within 21 days.

M.H. Mohamed Ajmeer
20/7/18

.....
M.H. Mohamed Ajmeer

JUDGE



At Lautoka
20 July 2018

Solicitors:

For the applicants/original plaintiffs: M/s Rams Law, Barristers & Solicitors

For the respondent/original defendant: M/s Munro Leys, Solicitors