

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION
CIVIL APPEAL NO.11 OF 1989

ON APPEAL FROM THE HIGH COURT
OF FIJI - APPLICATION FOR
JUDICIAL REVIEW NO.4 OF 1988

THE PUBLIC SERVICE COMMISSION

Appellant

- and -

MANUNIVAVALAGI DALITUICAMA KOROVULAVULA

Respondent

Ms. Clare Manuel for the Appellant
Mr. G.P. Shankar for the Respondent

APPLICATION FOR LEAVE TO APPEAL

(IN CHAMBERS)

DECISION

This is an application for leave to appeal against an interlocutory Order made by Jesuratnam J. on 20th January 1989 and sealed on 30th January whereby the Public Service Commission was ordered to produce under confidential cover for the Court's inspection within 21 days a memorandum dated 9.3.88 from the Acting Permanent Secretary for Works and Transport to the Secretary, Public Service Commission. The Public Service Commission also seeks extension of time within which to appeal coupled with a direction as to service of Notice of Appeal.

On 31st January 1989 the Public Service Commission filed with High Court Registry a summons applying for leave to appeal from the Judge's order to produce for his inspection the memorandum in question. On 31st March 1988 Jesuratnam J. gave his decision refusing leave to appeal to the Fiji Court of Appeal. His decision was sealed on 17th April 1989. The present application before me was filed on 24 April. It constitutes a fresh application and is not by way appeal.

The Appellant contends that documents such as this enjoys absolute immunity from production or inspection by Court. The Respondent argues that the document is vital to his case because it will show that the Public Service Commission in terminating his contract acted on the direction of the Minister of Works and Transport, and not in the proper exercise of its powers and functions.

Counsel for the Appellant has advanced 3 reasons why leave to appeal should be granted. They are as follows:-

- "(1). The question is of great importance upon which further argument and a decision of the Court of Appeal would be to the public advantage

(Buckle v. Holmes (1926) 2KB 125, p.127)

It is the Public Service Commission's contention that documents such as the one in question have absolute immunity from production or inspection by the Court. This is a point of public importance, as, it is contended, the functioning of the civil service would be inhibited if confidentiality of high level documents is not maintained. (Conway v. Rimmer p.914 - 915.)

- (2) The question is one of general principle, decided for the first time (Ex parte Gilchrist (1886) 17 QBD 521, p. 528).

We submit that although there have been various obiter comments concerning the production and inspection of a document such as the one in question, (e.g. Conway v. Rimmer (1968) p. 914-915; Burmah Oil Co. Ltd. v. Bank of England (1979) p.725), there is no decided authority on the point.

- (3) There is a prima facie case that an error has been made

- (i) We submit that the learned judge of first instance erred in law in that:

- (a) he did not consider whether the document in question fell into a class of documents which is immune from production and/or inspection.
- (b) he did not consider the tests for whether inspection of such documents should be ordered, laid down by the House of Lords in Air Canada v. SS for Trade (1983) 1 All ER 910.

(ii) We submit that the learned judge of first instance erred in fact in that:-

There was no evidence before him upon which he could have ordered that the document in question should be inspected by the court."

The reasons outlined in (3) above are basically the same as those stated in the intended grounds of appeal.

Mr. G.P. Shankar in opposing this application first contended that the request should be denied because the Appellant has failed to show any satisfactory grounds why it failed to appeal in time. By consent it was agreed that he be permitted to file written submissions to support his argument that the Appellant is out of time for appealing. He has not done so and has in fact informed the Registry that he does not intend to make any further submissions. Section 16 of the Court of Appeal Act reads as follows:

"Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that it to say -

- (a) in the case of an appeal from an interlocutory order, 21 days;
- (b) in any other case, 6 weeks."

However where leave is required as is the case here filing and service of a Notice of Appeal will be irregular if done before the requisite leave is obtained. It is to be noted that an application for leave to appeal was made, appropriately, in the Court below in the first instance within 21 days of the date of perfection of the Order appealed against.

And likewise the present application before me was also made within 21 days of the sealing of the Order of refusal in the Court below. Bearing in mind the sequence of steps taken by the Appellant in this case I am of the opinion that the question of showing good grounds for failing to appeal in time does not arise.

Mr. G.P. Shankar also argued that the Order made by Jesuratnam J. is not appealable. I have examined the 2 cases cited by him in support of his submission. These are:-

- (1) O'Rourke v. Darbishire 1920 All ER (Reprint) 1.
- (2) Bustros v. White (1876) 1 QBD 423.

In the O'Rourke's Case the disputed document was inspected by consent and the House of Lords held that no appeal lay from the judge's decision. In Bustros' Case the judge at the desire of both parties inspected the document in question and then decided whether the document should be produced or not. The English Court of Appeal held that it is not competent for either party to appeal. But in the present case objection to the inspection or production of the document in question was taken right from the outset and the primary judge has as yet not seen the memorandum.

I agree with Ms Manuel, Counsel for the Appellant from the Solicitor-General's Office that the facts of the 2 cases cited by Mr. Shankar are distinguishable from those of the present one. They do not assist Mr. Shankar's contention. I therefore hold that Jesuratnam J's decision is appealable subject to the requirement of obtaining leave. In other words there is no absolute bar to appealing.

Mr. Shankar has also argued that in any case Jesuratnam J's Order was correct and exercised in conformity with powers vested under Order 24 Rules 12 and 13 of the High Court Rules. His Order was also in line with a number of decided cases, he argued. He submitted that the House of Lords decision in Air Canada and Others v. Secretary for Trade and Another (No. 2) (1983) 1 All ER 910 on which the Appellant

relies heavily, is clearly distinguishable because the facts and circumstances do not fit in with those of the present case. Whilst I am inclined to agree that Air Canada's Case appears to be distinguishable, I must bear in mind that I am dealing with an application for leave to appeal and not with the merits of an appeal. It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the Order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not.

However as matters stand I am clearly of the opinion that the Appellant has raised a number of arguable legal issues of some importance which call for further arguments from both sides leading to an authoritative decision of the Fiji Court of Appeal. The question is whether this is the appropriate time to appeal. In my view it will be in the interest of both parties if these issues are resolved as soon as possible at this stage. Such a decision will ultimately be to public advantage also.

Consequently I grant leave to appeal and extend time within which to appeal. Notice of Appeal to be filed and served within 14 days from the date of making of this Order. Costs to be in the cause.

I further direct that the Registrar takes all reasonable steps to have this Appeal listed for hearing during the next session of the Fiji Court of Appeal.

Moti Tikaram
 (Sir Moti Tikaram)
 Resident Justice of Appeal

23rd June 1989