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

APPEAL NO.ABU0063 OF 2003

BETWEEN:

JETPATCHER WORKS (FIJI) LIMITED
APPELLANTS

AND:

THE PERMANENT SECRETARY FOR WORKS AND ENERGY OTHERS 63/03
RESPONDENTS

Coram: Hon. Ward, P
Hon. Eichelbaum, JA
Hon. Gallen, JA

Hearing : Tuesday, 13th July 2004

Counsel: Mr. I. Fa for Appellant
Mr. J. Udit and Mr. S. Sharma for Respondents

Date of Judgment: 16th July 2004

JUDGMENT OF THE COURT

The appellant company was incorporated in 1993 to carry out work on road patching. However, in 2000, the company acquired a fleet of three tonne trucks and water tankers for the use of the Public Works Department and Suva Water Supply.

The affidavit of Ajay Narayan, a director of the appellant, sets out the background:

> "21. The engagement of the 3 tonne triple cab trucks and water tankers were done in accordance with the requirements of the Major Tenders Board and the Controller of Government Supplies.
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> 22. That the engagement of Jetpatcher Works (Fiji) Limited for

the supply of all plant, vehicles and water tanks to the Public Works Department for use at the Suva Water Supply and related areas was pursuant to Tender CTN 27/98 and Tender CTN 18/2000. The supply of service, equipment and vehicles was done in accordance with the requirements of the Finance Act and Regulations.

23.That sometime in about June 2003 I was informed verbally by officers of the Suva Water supply that Jetpatcher's services for the hire of their vehicles, machinery and plant was no longer required. No reason was given.

26. That during this period when the Public Works Department and the Suva Water Supply stopped hiring my vehicles, plant and machinery, they continued to hire vehicles from other contractors at rates which were much higher than that which was being charged by the plaintiff.

28. To date we have not been informed in writing as to why our services, which had been properly hired under law was being terminated.

29. During the period of which our services were being utilised by the Suva Water Supply and the Public Works Department we are not aware of there being any complaint against us.

30. I have now found out from indirect sources that the Major Tenders Board has terminated my contract to provide services for hire of plant, vehicles and machinery to the Suva Water Supply and the Public Works Department.

31. I have also found out from indirect sources that the [Major Tenders Board] has whilst approving the hiring of plant and equipment from other contractors has specifically directed the [Permanent Secretary for Works and Energy] not to hire

any vehicles, plant and equipment from the plaintiff.

33. That the applicant has made a substantial investment in procuring plant, equipment and machinery to meet its contract that was legally awarded to it. It has an investment of approximately $2.5 million in plant, machinery and vehicles to service its contract with the respondents."

On 20 October 2003, the appellant filed an application for leave to apply for judicial review of the decision of the Major Tenders Board to terminate all contracts with the appellant and of its decision to approve an extension of the other contractors.

The application was heard by Jiten Singh J. He refused it on the ground that:

"In the present case the sources of power is a contract to provide services by supplying vehicles and machinery to the first and second respondents. Any breach of that contract is a matter of private law rights and not a public law matter.

Accordingly, I do not consider that this is a proper matter for a judicial review. Leave is accordingly refused."

In summary, the grounds of appeal are that the learned judge erred when he dismissed the application because the decision made by the government departments or officers involved was made in an exercise of their powers under statute and was therefore a matter for which judicial review was the appropriate course of action.

In their submissions, the respondents raised the preliminary objection that the appeal was not properly instituted because it required leave. They cited the decision of this Court in Charan v Shah and others; [1995] 41FLR 65, in which it was held that the refusal of leave to apply for judicial review was an interlocutory order and leave to appeal was therefore required. Counsel also referred the Court to Shore Buses Limited and others v Minister for Labour and Industrial Relations; FCA number ABU0055 of 1995, in which that decision was followed.

In the Charan case, the application for leave to seek judicial review related to alternative proceedings that were still being pursued. The judge refused leave to apply for judicial review on the basis that the applicant had not exhausted the avenues for appeal open to him in the parallel proceedings.

The Shore Buses case was an appeal from the dismissal of an application for leave for want of prosecution. The Court stated;

> "The order for dismissal of the application for judicial review brought the judicial review proceedings to an end. However, if dismissal had been refused, those proceedings would have continued."

In the case of a dismissal for want of prosecution those remarks are apposite but we consider that where, as in the present case, the refusal of leave was because the subject matter had not been shown to involve any matter of public law, the refusal of leave brings the proceedings for judicial review to an end and has finally determined the matter. It is not affected by the fact that it may still be open to the applicant to bring fresh proceedings in contract. That is a different cause of action.

In both the Charan and Shore Buses cases, the court applied the "application approach" to the determination of whether or not a judgment is final. However, in the more recent case of Josefa Nata v. the State; FCA number AAU0015 of 2002, the Court suggested the "order approach" was the proper test in criminal cases. The Supreme Court in Native Land Trust Board v. Narawa and another; number CBV0007 of 2002, has considered the same issue but does not appear to have changed the position. We consider that the approach by the court in Nata should also apply in civil proceedings.

In those circumstances, we distinguish the decisions in Charan Shore Buses and find that the refusal of leave in this case was a final order and as such did not require leave.

Turning to the substantive appeal. The facts of the case were set out in the affidavit of Ajay Narayan to which we have already made reference. That affidavit gave no

details of the nature of the agreement under which the appellant had been working. However, during the hearing and in answer to questions by the Court, it appeared that the engagement of the appellant resulted from a tender it had submitted to the respondents. No evidence was available as to the terms of the tender whether in relation to the length of the engagement or the method of termination if any.

Mr Fa explained to the court that he had no copy of any agreement and had hoped to obtain it by discovery if he had been granted leave.

As far as counsel could advise the Court, the respondent accepted the tender and no formal contract was drawn up based on it. In those circumstances it would appear the terms of the tender, once accepted by the respondent, would have formed the contract between them. Unfortunately the appellant could supply no copy of the tender either. Mr Fa again was relying on discovery to give him the evidence.

His submission, if we have understood it correctly, is that this award of a contract was a matter susceptible to judicial review because the Major Tenders Board is a statutory body which has to abide by the terms of the statute creating it and the regulations made under it. The relevant regulations are the Finance (Supplies and Services) (General) Regulations. They establish a Supplies and Services Board, a Major Tenders Board and a Minor Tenders Board and set out the basis upon which those Boards can accept or reject tenders. Once a tender is accepted, the regulations provide that only the Controller, who is the person in charge of the Government Supplies Department, may execute any contract for the supply of goods or services.

There is nothing to suggest that, once this has occurred, the performance of the contract is to be bound by anything but the normal rules of contract and the appellant has not been able to demonstrate anything to the contrary.

The learned judge took the same view and was clearly correct to do so. This is not a case involving matters of public law and, if there is any challenge to the manner in which the employment of the appellant was terminated, the remedy must lie in an action for breach of contract.

The appeal is dismissed.

The respondent seeks an order for costs on an indemnity basis on the ground that this was a wholly unmeritorious appeal. This was not argued before us and we do not consider that it is an appropriate order.

Order

Appeal dismissed with cost to the respondents to be taxed if not agreed.

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Ward, P

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Eichelbaum, JA

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Gallen, JA

FIJI COURT OF APPEAL

Solicitors:

Fa & Company, Suva for the Appellants
Office of the Solicitor General, Suva for the Respondents