

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

CIVIL APPEAL NO. ABU0070 OF 2007S  
(High Court Civil Action No. HBJ24D 037 of 2002S)

BETWEEN:            AIRPORTS FIJI LIMITED

*Appellant*

AND:                THE PERMANENT SECRETARY FOR LABOUR,  
INDUSTRIAL RELATIONS AND PRODUCTIVITY

*First Respondent*

AND:                DISPUTES COMMITTEE

*Second Respondent*

AND:                THE FIJI PUBLIC SERVICE ASSOCIATION

*Third Respondent*

Coram:            Pathik, JA  
                         Hickie, JA  
                         Lloyd, JA

Hearing:           Monday, 10<sup>th</sup> November 2008, Suva

Counsel:           C.B. Young for the Appellant  
                         S. Sharma with S. Levaci for the First and Second Respondents  
                         H. Nagin for the Third Respondent

Date of Judgment: Monday, 10<sup>th</sup> November 2008, Suva

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JUDGMENT OF THE COURT

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[1] There is before us for hearing an amended motion dated 16 September 2008 brought by the Fiji Public Service Association (the 3<sup>rd</sup> respondent in the substantive appeal proceedings) seeking orders striking out a Notice and Grounds of Appeal filed by Airports Fiji Limited (the appellant in the substantive

appeal proceedings) on 23 October 2007, such Notice and Grounds of Appeal appealing to this Court orders of Justice Jitoko refusing leave to Airports Fiji Limited to bring certain Judicial Review proceedings.

- [2] The 3<sup>rd</sup> respondent's strike out motion is brought pursuant to the provisions of s12 of the Court of Appeal Act and Rule 16 of the Court of Appeal Rules, it being asserted by the 3<sup>rd</sup> respondent that as the appellant's Notice is an appeal from an interlocutory order made by a judge of the High Court, it requires leave to be instituted (s12(2)(f) Court of Appeal Act) and was required to be filed within 21 days of the orders of Jitoko J being '*signed, entered or otherwise perfected*' (Rule 16(a), Court of Appeal Rules). The orders of Jitoko J were entered and sealed on 17 September 2007. The appellant submits the amended motion should be dismissed. The appellant submits that its Notice and Grounds of Appeal was filed within time and does not require leave. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in the substantive appeal also submit that the 3<sup>rd</sup> respondent's amended motion should be dismissed.
- [3] On the hearing of the present motion we are not called upon to determine or comment upon the merits of the substantive appeal and refrain from so doing. To dispose of this current motion it is unnecessary for us to describe the subject matter of the substantive appeal proceedings or the nature of the litigation before a Disputes Committee from whose determination Fiji Airports Limited sought leave from Jitoko J to judicially review. Suffice to say, the inferior tribunal was a Disputes Committee appointed by the Permanent Secretary for Labour and the dispute in question concerned the dismissal in 2002 by Fiji Airports Limited of 13 trainee firemen who had failed to report for work at the time of an industrial dispute.
- [4] The appellant's motion was filed on 23 October 2007, some 36 days after the orders of Jitoko J were entered and sealed by the Chief Registrar of the High Court. If the orders of Jitoko J are to be regarded as interlocutory orders, then Fiji Airports Limited needs leave to bring its appeal (which leave it has not sought) and it must seek that leave within 21 days of the orders being entered and sealed

(which it did not). If the orders are regarded as final, then no leave to appeal need be sought and the appellant's Notice is filed is within time.

- [5] The reason the 3<sup>rd</sup> respondent has brought this strike out motion is undoubtedly because of the effect of this Court's recent judgment in *Goundar v Minister for Health* ([2008] FJCA 40) ("*Goundar*") in which judgment this Court emphatically stated that a refusal of a High Court judge to order judicial review is to be regarded as an interlocutory order. Prior to the handing down of this Court's judgment in *Goundar* on 9 July 2008 the prevailing law and practice in Fiji was governed by the decisions of this Court in *Jetpatcher Works (Fiji) Ltd v Permanent Secretary for Works and Energy* ([2004] FJCA 40) and *Muma v University of South Pacific* ([1991] 37 FLR 109), the cumulative effect of these decisions being that the present orders under appeal by the appellant are final; that the time therefore within which an appeal must be commenced is six weeks and time is to be calculated from the date the orders are entered and sealed. That time starts to run from the date the orders of Jitoko J were entered and sealed was confirmed by the Supreme Court of Fiji in its recent judgment in *Pacific Agencies (Fiji) Limited v Mark Spurling* [2008] FJSC 27.
- [6] Quite obviously, this Court of Appeal bench is a differently constituted bench to that which sat in *Goundar*. But we agree totally with all that was said by this Court in *Goundar*. As a result of the decision in *Goundar* it would appear that the appellant's Notice, which was in compliance with the Court of Appeal Act and Court of Appeal Rules when filed on 23 October 2007, is now defective in two important respects. It is both out of time and brought without the leave of this Court that it now seems to require. But counsel for the appellant submits that this is not the end of the matter. He argues that the present strike out motion raises an important legal issue. That issue is this; does the law as now stated in *Goundar* have retrospective or prospective effect?
- [7] In answering the question posed counsel for the appellant has helpfully referred us to a number of cases which discuss whether judgments overruling earlier decisions of a court have prospective or retrospective effect (see, in particular, *In*

*Re Spectrum Plus Ltd (in liquidation)* [2005] 3 WLR 58, *Chamberlains v Lai* [2006] NZSC 70 and *Percy & Anor v Hall & Ors* [1996] 4 All ER 523).

- [8] The question as to whether a particular judgment overruling an earlier judgment of a court is to have prospective or retrospective effect needs to be determined on the particular facts of each case. But the cases cited above confirm a modern trend that a judgment or order should not be interpreted as having retrospective effect if by doing so it would cause injustice in the sense that it would inflict hardship or otherwise be unfair to litigants or others. Clearly, justice must be administered fairly and if retrospective overruling was to cause unfair and disruptive consequences then prospective overruling is to be preferred.
- [9] The appellant submits that prior to this Court's judgment in *Goundar*, legal practitioners advised clients and conducted their practices on the basis that an appeal from an order refusing leave to commence judicial review proceedings was an appeal as of right from a final judgment or order, not requiring leave and to be commenced within 6 weeks of the orders being entered. The appellant submits that if retrospective effect was to be given to the *Goundar* judgment then hardship may be caused to all those litigants and practitioners who have conducted their affairs on the basis of the law as it was prior to *Goundar*. We see merit in this submission.
- [10] This Court in *Goundar* did not explicitly state that the decision was to have prospective effect. But the Court in *Goundar* did say that it was important to practitioners and litigants to have certainty in the law. We are inclined to the view that the Court in *Goundar* implicitly intended its judgment to have prospective effect. Lest there be any doubt about the matter we rule that the law as stated in *Goundar* is to have prospective effect from the date the judgment was delivered on 9 July 2008. To decide otherwise would cause unfairness to practitioners and litigants alike.

### Conclusion

- [11] It follows from what we have said above that the appellant's Notice and Grounds of appeal was filed within time and does not require leave under the Court of

Appeal Rules. Given that the Court in *Goundar* did not explicitly state its judgment was to have prospective effect, we feel it appropriate that we make no order as to the costs of the parties of and incidental to the hearing of the 3<sup>rd</sup> respondent's amended motion.

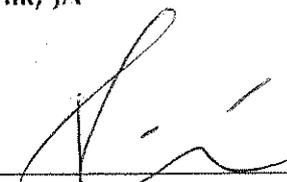
[13] Further, we repeat the sentiments expressed by the Supreme Court in *Pacific Agencies (Fiji) Limited v Mark Spurling* that it is 'incumbent on members of the profession to act reasonably and cooperatively'. While it was clearly open to the 3<sup>rd</sup> respondent to bring its amended motion we are somewhat surprised that it saw fit to do so in a situation where inevitably leave to appeal out of time would have been granted.

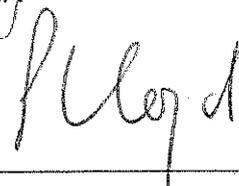
[14] For the above reasons we order that:

- (1) The 3<sup>rd</sup> respondent's amended motion be dismissed;
- (2) There be no orders as to costs.

  
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Pathik, JA



  
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Hickie, JA

  
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Lloyd, JA

**Solicitors:**

Young and Associates, Lautoka for the Appellant  
Office of the Attorney General Chambers, Lautoka  
for the First and Second Respondent  
Sherani and Company, Suva for the Third Respondent