

IN THE COURT OF APPEAL
(ON APPEAL FROM THE INDEPENDENT
LEGAL SERVICES COMMISSION)

CIVIL APPEAL ABU 58 OF 2013
(ILSC No.4 of 2013)

BETWEEN : **ANAND KUMAR SINGH**

Appellant

AND : **CHIEF REGISTRAR**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Singh with Mr V Singh for the Appellant**
Mr V Sharma for the Respondent

Date of Hearing : **13 and 16 December 2013**

Date of Decision : **20 December 2013**

DECISION

[1] There are two applications before the Court. The first application is by summons to fix security for costs. The second application is by notice of motion for a stay of execution pending appeal.

[2] The first application was commenced by summons dated 18 November 2013. The Appellant sought an order that:

“The requirements as to the amount and nature of security for costs to be given by the Appellant for the prosecution of his appeal be dispensed with or alternatively be fixed for the payment thereof and for an order that the said amount if so ordered be deposited by the Appellant with the Chief Registrar of the High Court of Fiji a reasonable sum as to the probable expenses for the preparation, certification and copyright of the inquiry record and a further order that costs of this application be costs in the cause.”

[3] This application is made pursuant to Rule 17 (1) (a) (ii) and (1) (b) of the Court of Appeal Rules. It would appear that the application has been made within the time specified by the Rules. The application for the dispensing of the requirement to deposit an amount for costs with the Registrar was not supported by affidavit material. The application was opposed. As the Chief Registrar is a party to the appeal the application came before a single judge of the Court of Appeal pursuant to section 20(1) of the Court of Appeal Act Cap 12. Counsel presented oral submissions on this issue on 16 December 2013.

[4] The second application was commenced by Notice of Motion filed on 29 November 2013. The Appellant sought the following orders:

- “1. That the judgment and sentence as passed against the Appellant on 7 November 2013 by the Independent Legal Services Commission be stayed pending appeal.*
- 2. The Respondent and or its servants and or agents and or whosoever be restrained from further occupying or interfering with the practice of the Appellant until further order of Court; and*
- 3. The time for service and hearing of the application be abridged.”*

[5] This application is made pursuant to Rule 34(1) and Rule 26 (3) of the Court of Appeal Rules (the Rules). It is therefore a renewed application in so far as it relates to a stay of execution pending appeal. The initial application for a stay pending appeal was dismissed by the learned Commissioner in a written Ruling dated 28 November

2013. The application comes before a single judge of the Court of Appeal pursuant to section 20(1) of the Court of Appeal Act (the Act).

[6] This application was supported by an affidavit sworn on 29 November 2013 by Anand Kumar Singh. The application was opposed by the Respondent who filed an answering affidavit sworn on 6 December 2013 by Mosese Waibuta. The Appellant filed a reply affidavit sworn on 10 December 2013 by Anand Kumar Singh. Pursuant to directions given by the Court on 9 December 2013, parties filed written submissions on 11 December 2013. During the course of the mention hearing on 9 December 2013 Counsel for the Appellant informed the Court that the second order sought being injunctive in nature was in the alternative to the first order sought in the Notice of Motion. The parties presented extensive oral submissions on 13 December 2013 in addition to their written submissions. During the course of the hearing Counsel for the Appellant informed the Court that the Appellant was withdrawing the application for the alternative relief.

[7] The Appellant appeared before the Independent Legal Services Commission on a complaint filed by the Respondent pursuant to section 111 (1) of the Legal Practitioners Decree 2009 (the Decree). The complaint was one of professional misconduct contrary to section 83 (1) (g) of the Decree. The particulars were stated as:

“Anand Singh a legal practitioner, from 26 June 2013 till date, failed to respond to a complaint lodged by Federated Airline Staff Association within the time stipulated in the notice issued by the Chief Registrar pursuant to section 104 and 105 of the Legal Practitioners Decree 2009 and thereafter failed to respond to a subsequent reminder notice dated 29 July 2013 issued by the Chief Registrar pursuant to section 108(1) of the Legal Practitioners Decree 2009 which conduct contravened section 108(2) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.”

[8] The background facts to the complaint were conveniently summarised by the learned Commissioner and are reproduced in this Decision:

“2. The facts of the case are that the Chief Registrar, having received notice of a complaint about the practitioner from a former client, wrote to the practitioner on the 26th of June

2013 providing him with details of the complaint and requesting pursuant to section 105 of the Decree that he respond by 18th of July 2013. There was no reply to that letter. The Registrar again wrote to the practitioner on 29th of July 2013 (in terms of s.108 of the Decree), enclosing a copy of the earlier letter and granting him a further 14 days to offer an explanation for the complaint. That letter was received by a staff member of his office and indeed the practitioner acknowledges receipt of the letter.

3. On the 9th of August 2013, 3 days before expiry of the time given, the practitioner wrote to the Registrar in the following terms: (the letter is a large part of the practitioner's "defence" and it is therefore reproduced in full).

"9th August, 2013

Dear Sir,

Re: Notice section 108 of the Legal Practitioner's Decree 2009

Complaint by Federal Airline Staff Association: Ref no. 72/13

I acknowledge your letter dated 29th July 2013.

I wish to seek your indulgence in postponing my response thereto to sometime after the 6th of September 2013.

The reason for the deferral is that I am suffering from ill health and will be able to attend to the response after my surgery in late August, 2013.

I await after (sic) your response to my request.

Yours faithfully,"

4. *There was no reply from the Chief Registrar to this letter."*

[9] At the hearing before the Commission the Appellant was represented by Counsel. The learned Commissioner noted in paragraph 6 of the Judgment that Counsel appearing for the Appellant agreed to the background facts and relied on the defence of "furnishing a reasonable explanation for such failure" contained in section 108(2) of the Decree. Having considered the affidavit material and the oral evidence given at

the hearing, the learned Commissioner concluded that the letter dated 9 August 2013, being just three days before the expiration of the Respondent's deadline, was a tactical delay measure. The explanation in the letter and the proven medical evidence did not amount to a reasonable explanation for non-compliance. The complaint of professional misconduct against the Appellant was found to be established. The Commissioner imposed a penalty of two months suspension of the Appellant's practising certificate from the date of the judgment being 7 November 2013.

[10] The Appellant, being unhappy with the Judgment filed a notice of appeal seeking an order that the judgment and sentence handed down by the Commissioner be set aside and quashed on the following grounds:

1. *That the Appellant breached no orders or directions as per the charge of professional misconduct under Section 83 (1) (g) of the **Legal Practitioners Decree 2009** and as such the charge under Section 83(1) (g) was never prosecuted;*
2. *That the Appellant was denied natural justice when the allegations against him were not fully supported by evidence in the depositions before the ILSC;*
3. *That the Commissioner erred in law and in fact in hearing or continuing to hear the matter further and making a determination when facts were borne out which connected him as a witness;*
4. *That the Commissioner erred in law and in fact in finding the Appellant guilty of professional misconduct when the Appellant had a reasonable excuse for his circumstances, and which was accepted by the ILSC;*
5. *That the Commissioner erred in law in imposing a penalty without giving the Appellant an opportunity to plead in mitigation prior to sentence; and*
6. *The sentence, as imposed on the Appellant, is harsh, unjust and unfair in the circumstances of the case."*

Application for stay

[11] Although filed after the summons it is appropriate to consider first the application in the Notice of Motion for a stay pending appeal.

[12] In **Native Land Trust Board –v- Shanti Lal and Others** (unreported CBV 9 of 2011; 20 January 2012), the Supreme Court (Gates CJ) cited with approval the principles summarised by the Court of Appeal in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** (unreported ABU 11 of 2004; 18 March 2005) for determining whether there are sufficiently exceptional circumstances for the grant of stay relief pending appeal. They are:

- “(a) *Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative).*
- (b) *Whether the successful party will be injuriously affected by the stay.*
- (c) *The bona fides of the applicant as to the prosecution of the appeal.*
- (d) *The effect on third parties*
- (e) *The novelty and importance of questions involved*
- (f) *The public interest in the proceeding*
- (g) *The overall balance of convenience and the status quo.”*

[13] These principles have evolved from cases that have usually involved money judgments. It is therefore not surprising that in such cases the factor of the public interest is not one that usually calls for any substantive consideration or analysis. However as Marshall JA noted in **Naidu –v- The Chief Registrar** (unreported ABU 38 of 2010; 2 March 2011) the situation is different where a regulator in the person of the Chief Registrar representing the public interest has been successful in proceedings before a disciplinary tribunal. The Chief Registrar is the regulator of the legal profession and in opposing an application for stay of execution pending appeal as the successful party at first instance he is representing the public interest.

[14] In money judgments a reference to special circumstances standing in the way of the successful party enjoying “*the fruits of the judgment*” is usually taken to mean situations where (1) possible non-payment by an impoverished plaintiff should the appellant’s appeal be successful and (2) where the plaintiff is a foreigner living overseas. These factors do not apply in this case. The only special circumstance which may stand in the way of the successful regulator is the fact that the appeal will be rendered nugatory in the event that a stay is not granted. The appeal will not come before the Court of Appeal before 7 January 2014 when the period of suspension comes to an end. However I am not satisfied that that factor alone is sufficient for the

Court to exercise its discretion in the Appellant's favour when it is recalled that the position of the Respondent is fortified by his representing an important public interest. The authorities to which the Respondent made reference in his written submissions lead to the conclusion that in cases where the protection of the public is concerned the public interest should always be entitled to significant weight. The authorities also indicate that the power given to the Commission to cancel or suspend a practising certificate is exercised not to punish the legal practitioner but to protect the public. In **New South Wales Bar Association v Stevens** 52 ATR 602 Spigelman CJ at paragraph 108 stated:

“In such a context the exercise of the Court’s power to stay must give significant weight to the protection of the public and the public interest involved in ensuring that persons who practice the profession of law comply with the highest standard of integrity.”

[15] In **New South Wales Bar Association –v- Cummins** (2001) 52 NSWLR 279 Spigelman CJ at paragraph 20 observed that:

“_ _ _ Neither the relationship of trust between a legal practitioner on the one hand, and his or her clients, colleagues and the judiciary on the other hand, nor public confidence in the profession can be established or maintained, without professional regulation and enforcement.”

[16] In my view public confidence in the legal profession in Fiji can only be established and maintained by effective professional regulation and enforcement. The task of effective regulation falls to the Chief Registrar under the Decree. Any legal practitioner who disregards attempts by the Regulator to protect the public in Fiji is undermining the regulatory regime in the Decree thereby undermining public confidence in the profession. By ignoring the Chief Registrar's correspondence from 26 June to 9 August 2013 and then only at the last moment providing an explanation that was held not to be reasonable the Appellant has failed to acknowledge his professional responsibility and failed to either accept or recognise the important role of the Chief Registrar to act in the public interest. The public interest dictated an appropriate response to the matter raised by the Chief Registrar and it also dictated that such a response be provided in a manner that was consistent with the highest professional standards.

[17] In this case the public interest outweighs the right of the practitioner to continue in practice until the appeal is heard.

[18] In **Legal Services Commissioner –v- Baker** [2005] QCA 482 Chesterman J at paragraph 28 said:

“In particular it should be accepted that an applicant for a stay of a recommendation that his name be removed from the roll of Legal Practitioners should show a cogent reason for the stay, and he will not do so merely by showing that he will be unable to practise his profession until his appeal is heard and allowed. Every practitioner who is suspended from practice or whose name is removed from the roll suffers that prejudice but it is clearly not right that a stay is, or should be granted as a matter of course. Something more must be shown than prejudice of this kind. The additional factors which would justify a stay must be such as outweigh the public interest in having unfit practitioners debarred from practice. That interest is to be afforded particular significance.”

[19] The Appellant has not established any special circumstance that outweighs the paramountcy of the public interest. In the **Naidu** decision (supra) Marshall JA stated that a second consideration may affect the exercise of the discretion in favour of the Appellant. The Court should assess whether any ground of appeal has an exceptional chance of succeeding. There are, however, two qualifications to this consideration. The first is that where there are exceptional chances of success shown to exist, that matter is no more than a new special circumstance to be considered with the other applicable principles, particularly the public interest, in determining whether there is justification for granting a stay. The second qualification is that the grounds upon which reliance is placed in terms of chances of success must be shown to be exceptional. In **Atkins –v- Great Western Railway** (1885-86) 2 Times Law Reports 400 Lord Esher MR said:

“_ _ _ strong grounds of appeal is no reason for no-one ought to appeal without strong grounds for doing so_ _ _.”

[20] Although it is not for a single judge of the Court to delve into the merits of the appeal, it is necessary to assess the Appellant’s grounds to determine whether any one of

them meets the high threshold of exceptional chances of success that may constitute a special circumstance to be considered along the other factors relevant to the present case.

- [21] The first ground of appeal alleges that the charge should not have proceeded under section 83(1) (g) of the Decree since the Appellant never breached any orders or directions of the Registrar under the Decree. The Appellant's submissions claim that the notices issued by the Registrar under sections 105 and 108 do not amount to orders or directions. The submissions also claim that the particulars provided by the Registrar are defective because they refer to an offence under section 108(2) of the Decree.
- [22] Whether there is a defect in the wording of the particulars is by no means clear. Section 108(2) of the Decree provides that a failure to comply with the notice issued by the Registrar shall be deemed to be professional misconduct. However it is under section 83(1) that proceedings for professional misconduct are commenced. Whether the charge is defective and whether the notices issued by the Registrar are orders or directions for the purposes of section 83(1) (g) may be arguable but the ground falls well short of exceptional chances of succeeding.
- [23] It must also be noted that this ground was not raised by the Appellant or his Counsel at any stage in the proceedings before the Commissioner. The Appellant himself is an experienced senior legal practitioner.
- [24] The issue raised by ground 2 that the evidence before the Commissioner did not support the allegations in the charge is a matter that can only be determined by the Court of Appeal with the benefit of the transcript and record. It may be arguable but on a reading of the Judgment does not reach the standard of exceptional chances of succeeding.
- [25] Ground 3 raises an issue concerning the propriety of comments made by the Commissioner in his written judgment. What view should be taken of the comments is a matter for the Court of Appeal. The ground does not have exceptional chances of succeeding.

- [26] Ground 4 relates to the finding by the Commissioner that the evidence put forward by the Appellant did not provide a reasonable explanation. Whether that was a finding open to the Commissioner on the evidence before him is a matter for the Court of Appeal. The ground does not have exceptional chances of succeeding.
- [27] Ground 5 claims that the Appellant was not given an opportunity to mitigate prior to sentencing. The submissions by Counsel for the parties on this ground referred to what they remembered about the proceedings. Whether there was given to the Appellant an opportunity to mitigate can only be answered by examining the record. Whilst the ground is arguable it does not have exceptional chances of succeeding.
- [28] Ground 6 concerns the sentence imposed by the learned Commissioner and in my judgment the penalty of two months suspension is not wrong in law and does not even raise an arguable point.
- [29] As a result I am not satisfied that the grounds of appeal have exceptional chances of succeeding and therefore do not amount to a special circumstance to be considered with the other factors relevant to this case, especially the public interest.
- [30] Before concluding this part of the decision it is appropriate to comment on paragraph 15 of the Appellant's affidavit in support sworn on 29 November 2013. The opening sentence of that paragraph states:

"I believe that in seeking to close my office the Respondent has to follow the prescribed procedures under the Legal Practitioner Decree 2009 but has not done so."

- [31] When pressed by the Court, Counsel for the Appellant indicated that the reference to the procedures not being followed was a reference to the fact that a receiver had not been appointed. Under the Decree the appointment of a receiver is a discretionary matter for the Registrar. Perhaps what is not so clear is the issue as to what are the rights and obligations of both parties when a receiver has not been appointed. Both Counsel made unsubstantiated allegations about the conduct of the other party.

Counsel were reminded that evidence from the bar table would not be considered by the Court.

[32] For the reasons stated in this decision the application for a stay of execution pending appeal is dismissed.

Security for costs

[33] The Appellant seeks an order from the Court dispensing with the requirement for him to give security for the prosecution of the appeal. The Appellant did not file any affidavit material in support of his application. There was therefore no factual basis or evidence formally before the Court. In his submissions Counsel pointed to the fact that the Appellant had not been able to practise law since 7 November 2013. That is hardly a valid reason for dispensing with the usual practice of requiring an appellant to provide security for prosecuting the appeal.

[34] Counsel also pointed to the issue of the Appellant's health problems during the year. There was no information before me as to how long the Appellant was not able to practice, the amount of potential income lost because of his health problems nor the costs of hospitalisation and treatment and whether health insurance was involved. There was no information as to the present state of the Appellant's financial position. Without such information it is not possible for the Court to determine whether it would be proper to dispense with the usual requirement that appellants provide security to prosecute an appeal.

[35] There were other matters raised by Counsel for the Appellant during the course of his submissions. However I do not consider them to be relevant to the issue of whether the Appellant should provide security for costs.

[36] In summary there was no material adduced by the Appellant which would lead me to conclude that an order should be made in favour of the Appellant. There is no reason why the Appellant should not do what is required by Rule 17 and provide security to prosecute the appeal in the sum of \$3000.00 to be deposited with the Registrar within 28 days from the date of this decision.

Orders:

1. *Application for stay pending appeal is dismissed.*
2. *Security for costs to prosecute the appeal is fixed in the amount of \$3000.00 to be deposited with the Registrar within 28 days from the date of this decision.*

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HON. MR JUSTICE W.D. CALANCHINI
PRESIDENT, COURT OF APPEAL