

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No.: HBJ 03 of 2018

IN THE MATTER of an application by **DR. VIKASH SINGH** for leave to apply for Judicial Review (Order 53 r3).

AND

IN THE MATTER of an application by **DR. VIKASH SINGH** for a Judicial Review and with the other reliefs including an Order of Certiorari to quash the Notice of Complaint and Allegations filed by the Registrar and Chief Executive Officer of the Fiji Medical and Dental Secretariat purportedly made on behalf of the Fiji Dental Council and filed in the High Court of Fiji on 9 May 2018 (**'Complaint'**) and an order of Prohibition to prohibit the Fiji Medical and Dental Professional Conduct Tribunal from hearing and determining the Complaint and other reliefs as contained herein.

BETWEEN : **DR. VIKASH SINGH** of Stewart Street Dental Practice, Dental Practitioner, Suva.

APPLICANT

AND : **THE FIJI DENTAL COUNCIL** a corporate body established pursuant to Part 3, Section 8 of the *Medical and Dental Practitioner Act 2010*, with its registered location at 1 Brown Street, Suva.

FIRST RESPONDENT

AND : **THE REGISTRAR AND CHIEF EXECUTIVE OFFICER OF THE FIJI MEDICAL AND DENTAL SECRETARIAT** an appointment established pursuant Section 26 of the *Medical and Dental Practitioner Act 2010*, of 1 Brown Street, Suva.

SECOND RESPONDENT

Counsel : **Ms. Prasad L for the Applicant**
Mr. Toganivalu D for the Respondents
Date of Hearing : **20th June, 2018**
Date of Judgment : **21st June, 2018**

JUDGMENT

INTRODUCTION

1. The Applicant had brought the proceedings before this court seeking leave for judicial review of complaint filed by the Registrar and Chief Executive Officer (CEO) of Fiji Medical and Dental Secretariat on behalf of the Fiji Dental Council (FDC), a certiorari and prohibition or alternately for declaration , and for a stay of hearing of the complaint filed by the Respondents . The Applicant is the President of Fiji Dental Association (FDA) since 2010 and had refused to submit individual indemnity cover as requested by 2nd Respondent in terms of Section 45(6)(c) read with Section 52(1) of Medical and Dental Practitioners Act, (MDPA)2010. Said provisions of law require FDC to lay down the manner and extent of the indemnity cover. There is no evidence of FDC making a determination under the law relating indemnity cover of the professionals. The Applicant did not submit individual indemnity cover requested by 2nd Respondent, at the time of making his application for renewal of licence to practice in 2017, but had done so in 2018 about three weeks before the expiration of the time period under indemnity cover. The Applicant is also challenging the actions of the 2nd Respondent on the basis of *ultra vires* and bias.

2. The judicial review seeks a certiorari to quash the complaint against the Applicant and also prohibition against determination of that complaint by the tribunal and or, a declaration that the complaint is null and void in law. The Plaintiff is also seeking to stay the proceedings before Medical and Dental Professional Conduct Tribunal (The Tribunal) until final determination of the judicial review.

ANALYSIS

3. The non submission of individual indemnity cover for professional duties was due to a long overdue policy dispute regarding the compliance of Sections 45(6) and 52(1) of MDPA, 2010.

4. There were numerous emails that had exchanged between the Applicant as President of FDA and also relevant authorities including permanent secretary to the Ministry of Health.

5. Failure to resolve the issue of individual indemnity certificate of members of FDA had resulted Applicant not being issued with a practicing certificate from March, 2017. The 2nd Respondent had laid a complaint against the Applicant for practicing without a valid practicing licence.
6. The Respondents had laid a complaint against the Applicant to the Tribunal. The Applicant is seeking leave for judicial review the complaint and or a declaration that said complaint is null and void. The Applicant is also seeking prohibition against the Tribunal and also interim stay of the proceedings before the Tribunal.
7. The Applicant needs to obtain leave of the court to proceed for judicial review and such grant of leave can operate as interim stay of proceedings before Tribunal, in terms of Order 53 rule 3(8(a), on direction of the court. The requirements for leave for judicial review is contained in Order 53 rule 3(2)-(5) of the High Court Rules of 1988.
8. The High Court Order.53, rule 3(2)-(5) state –
 - “(2) An application for leave must be made upon filing in the Registry:*
 - (a) A notice in Form 32 in the Appendix hereunder containing a statement of*
 - (i) the particulars of the judgment order, decision or other proceeding in respect of which judicial review is being sought;*
 - (ii) the relief sought and the grounds upon which it is sought;*
 - (iii) the name and description of the applicant;*
 - (iv) the name and address of the applicant’s Solicitors (if any);*
and
 - (v) the applicant’s address for service;*
 - (b) an affidavit which verifies the facts relied on.*
 - (3)(i) Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.*
 - (ii) The Court may determine the application without hearing and where a hearing is considered necessary the Court shall hear and determine the application inter partes.*
 - (iii) Notice of hearing of the application be notified in writing by the Registrar.*
 - (iv) Where the Court determines the application without a hearing, the Registrar shall serve a copy of the order of the Court on the applicant.*
 - (4)*

(5) *The Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates.*"

9. The Application for Leave had fulfilled the requirements of O.53, r3(2) and (3) and (5) as –
 - a. it is in Form 32 of the Rules and contains a statement of all of the mandatory particulars stipulated in r 3(2)(a);
 - b. the Affidavit in Support verified the facts relied on as required by r3(2)(b);
 - c. as required by r3(3)(i) copies of the Leave Application together with the Affidavit in Support were served on all persons directly affected by the Leave Application . The Respondents are the directly affected parties at the moment as they are the relevant body and person who are directly affected.

10. The directly affected parties from the Application are made parties to this application. This is an important aspect that needs careful consideration at the stage of Application for Leave. No objection was raised by Respondents in this aspect and since the Applicant is challenging only the complaint against him the directly affected parties are before the court.

11. The High Court Order 53 rule 5 contains the requirement that the Applicant have a "sufficient interest in the matter to which the application relates". The Applicant is the person subjected to an inquiry before the Tribunal and the relief sought is directly related to the said act to refer the issue relating to the Applicant. So he had sufficient interest in the matter to which the application relates.

Preliminary Issues

12. At the outset counsel for the Respondents objected to this application and stated that any issue of law or procedural matters need to be referred to the Tribunal and not to High Court for judicial review as the tribunal is empowered to deal with such issues in terms of Section 75(1) of the MDPA, 2010.

13. The jurisdiction of the Tribunal is stated in Section 74 of the MDPA, 2010. The jurisdiction for the Tribunal to deal under Section 74 of MDPA, 2010 is not the same as Judicial Review for certiorari and prohibition and also power of the court for a declaration that are sought by the Plaintiff in terms of Order 53 of High Court Rules of 1988.

14. There is no provision, for the Applicant to raise all the issues raised in judicial review, including a declaration that is raised in this application, before the Tribunal.
15. Tribunal being a creature of statute, cannot confer jurisdiction other than what was expressly granted in Section 74 of MDPA, 2010. In my judgment the Applicant is not precluded from seeking judicial review considering the circumstances of this case, and orders sought, for judicial review.
16. The Respondents had also raised an issue of Respondents not being public office and State Services Act, 2009 Section 2(h) defines the "Public Office" as 'an office established by a written law'. The Respondents are created by a statute hence the objection is overruled.
17. Fiji Court of Appeal in *Proline Boating Co. Ltd vs Director of Lands etal* (ABU 20 of 2013)(decision on 25.9.2014)(unreported) stated
'...if an authority does the right thing in wrong way then it would amount to procedural ultra vires or procedural impropriety'.
18. The Applicant states, that Respondents have acted ultra vires in that they had no jurisdiction to refer this matter to the Tribunal under Section 61(3)(a) and (b) of MDPA, 2010 (this had been erroneously stated as Section 62(3) under hearing 'Jurisdiction' in the 'Allegations' filed before the Tribunal) for the following reasons:
 - (a) The Professional Conduct Committee has not decided to conduct a disciplinary hearing as required under Section 61(3) of MDPA, 2010.
 - (b) The Applicant was not given an opportunity to elect to have the matter dealt with by the Tribunal as required under Section 61(3)(a) of MDPA, 2010.
19. In the affidavits filed by the 2nd Respondent and also his deputy these issues are not addressed and even at the hearing no submission was made relating to above, legal contention.
20. In the affidavit in opposition at paragraph 27, 2nd Respondent state that Deputy Registrar had stated to him that the complaint against Applicant, was made in terms of Section 61(1)(c) MDPA, 2010. First, this is hearsay statement secondly, there is no

evidence to indicate such a direction from Professional Conduct Committee to investigate Applicant.

21. In terms of Section 61(1)(c) upon the receipt of the report of investigation by the Professional Conduct Committee (which they had requested) may recommend to FDC to refer the matter to Tribunal. No such recommendation from the Professional Conduct Committee is produced. In terms of Section 56(2)(d) of MDPA, 2010, it is the Professional Conduct Committee who can request an investigator to investigate a complaint
22. Even the affidavit filed by the Deputy Registrar had not attached any evidence of such determination and or direction by Professional Conduct Committee and or FDC as required by law in terms of Sections 61 MDPA, 2010
23. Section 61(1)(c) grants a discretion to Professional Conduct Committee to recommend FDC to refer the matter to Tribunal. So even if the investigation was done through the request of the Professional Conduct Committee, they are not obliged to accept the report of the investigation and they needs to exercise the discretion granted by law, before it is referred to FDC.
24. There is no evidence of appointment of investigator by Professional Conduct Committee and there is no evidence of that report from the investigator was considered and a decision taken by the Professional Conduct Committee to recommend FDC to refer the matter to the Tribunal.
25. The Applicant state that Second Respondent has acted ultra vires in that he had no jurisdiction to appoint an Investigator under MDPA, 2010. The 2nd Respondent denied that he appointed the investigator to investigate the Applicant.
26. In terms of Section 58(1) MDPA, 2010, the selection and appointment of investigator under the Part 9 of MDPA, 2010 is vested with FDC or to delegate that authority to the Professional Conduct Committee. There is no evidence of compliance of that provision of law, too. Only such an appointee can investigate the complaint against Applicant.

27. The investigator, in his report states that on 25.1.2018, he was told by the Second Respondent that he was appointed to investigate Applicant, but failed to annex any authority. Again the Respondents failed to submit such appointment of an investigator, by FDC or any other authority in terms. Part 9 of MDPA 2010 and appointment specifically to investigate complaint of the Applicant.
28. The 2nd Respondent states that he is empowered to make a complaint in terms of Section 56(1)(c) of MDPA,2010. Such a complaint from the 2nd Respondent needs to be made to Professional Conduct Committee and in order to alleviate any fear of bias Professional Conduct Committee should act in terms of the MDPA, 2010 for the appointment of an investigator for said complaint. There are sufficient safeguards contained in MDPA, 2010 for the efficient investigation, and they needs to be complied.
29. Section 56(3) of MDPA, 2010 *inter alia* provides that if the Professional Conduct Committee is satisfied that the '*complaint arose from a misapprehension on the part of the complainant or from a misunderstanding between the parties*' the said Committee in its discretion may require the parties to attend before the 2nd Respondent for an informal meeting to clarify or define the issues.
30. There is no evidence of the complaint and or the investigation report being dealt by the Professional Conduct committee, so no discretion of Professional Conduct Committee applied to the Applicant and or the issues raised by him regarding the indemnity cover that had resulted his refusal to submit it.
31. Procedure ultra vires or procedural impropriety is a ground for Judicial Review as stated in Fiji Court of Appeal in Proline (supra). (See CCU v Minister of Civil Services [1985] AC 375).

Indemnity Cover against loss

32. The requirement to indemnify 'in a manner and to an extent approved by' FDC is mandatory for registered person dental treatment in terms of Section 52(1) of MDPA, 2010. This is a requirement for annual licence in terms of Section 45 (6)(c) of MDPA,2010. There is no evidence of the legal requirements under Sections 52(1) and

45(6)(c) MDPA, 2010 regarding the 'manner and extent approved by' FDC as regard to the indemnity cover by the professionals.

33. Without determination of above requirement by FDC, the 2nd Respondent is refusing the issuance of licence to the practitioners including the Applicant, who had insisted the compliance under the law. So the issue is refusal of the 2nd Respondent to issue licence to the Applicant who had request the compliance of law by the Respondents in terms of MDPA, 2010
34. There was no evidence of reference of the complaint and the investigation and supporting material that amply demonstrate the issues raised by the Applicant to the Professional Conduct Committee. This had not happened as 2nd Respondent's complaint against Applicant was not considered by the Professional Conduct Committee in terms of law in the appointment of an investigator and or deliberation on the report submitted by the investigator.
35. In the allegation/complaint filed before the Tribunal 2nd Respondent had signed them as CEO of FDC which is obviously an error as there no such position in terms of MDPA, 2010
36. The Second Respondent in the allegations filed before the Tribunal, on 09 May 2018 did so as the Chief Executive Officer of the FDC. He is precluded from being a member of FDC in terms of Section 26(1) MDPA, 2010. Section 26(3) of MDPA, 2010 states that he Registrar is the Chief Executive Officer of the Secretariat.
37. The 2nd Respondent is the authority that is entrusted with the issuance of licence or renewal of licence for a practitioner under MDPA, 2010. The requirements for an application are stated in Section 45 of MDPA, 2010. He is required under Section 46(1) MDPA, 2010 to accept an application for licence in terms of Section 45 of MDPA, 2010.
38. The issue relate to requirement stated in Section 45(6)(c) MDPA,2010. FDC is required to define what is the proper evidence that an applicant needs to submit in relation to indemnity insurance. This is an issue that affect the professionals and also patients as the Applicant had raised an issue of cost in obtaining individual insurance

cover as opposed to a group insurance cover. These are matters of policy that needs careful consideration by FDC before deliberating in terms of recommending evidence of indemnity cover and its 'manner and extent'. There is no evidence of such deliberation and or decision by FDC in terms of Sections 52 (1) and 45(6)(c) under MDPA,2010 for the 2nd Respondent to act in terms of Section 46 of MDPA,2010 in the issuance of licence.

39. Though the 2nd Respondent is the authority to issue licence he is obliged to accept evidence of indemnity insurance required by FDC but no determination of FDC as to manner and extent of indemnity cover presented. This had resulted impass between the Applicant and Respondents.
40. So, I am satisfied that there are arguable cases (see Proline (supra) for determination in the juridical review application hence leave for judicial review is granted. (See CCSU v Minister of Civil Service [1985] AC 374). This leave for certiorari and prohibition will operate as stay of proceedings before the Tribunal until final determination of the judicial review or a contrary order is made by the court in terms of Order 53 rule 3(8)(a) of High Court Rules of 1988.

FINAL ORDERS

1. Leave for judicial review is granted.
2. The grant of judicial review is to operate as stay of proceedings against the Applicant filed on 9th May 2018 (MDT 2 of 2018) before Medical and Dental Professional Conduct Tribunal until final determination of the judicial review or an order is made contrary to that.
3. The cost of this application to be borne by parties.

Dated at Suva this 21st day of June, 2018



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Justice Deepthi Amaratunga
High Court, Suva