

**JETPATCHER WORKS (FIJI) LTD v PERMANENT SECRETARY FOR WORKS, ENERGY and Ors (ABU0063 of 2003)**

5 HIGH COURT — CIVIL JURISDICTION

WARD P, EICHELBAUM and GALLEN JJA

13, 16 July 2004

10 **Practice and procedure — appeal — judicial review — whether public law matter — Finance Act — Finance (Supplies and Services) (General) Regulations.**

The Appellant company, which was engaged in the business of road patching, was hired to supply all plant, vehicles and water tanks for use at the Suva Water Supply and other related areas. Later, in June 2003, the officers of the Suva Water Supply verbally informed

15 the Appellant of its decision to terminate its services but no reason was provided.

On 20 October 2003, the Appellant filed a leave to apply for judicial review of the decision of the Major Tenders Board terminating all contracts with the Appellant and of its decision approving an extension of the other contractors. The application was refused on the ground that the contract to supply vehicles and machinery to the Respondents and any breach of that contract was a private law right. Thus, the Appellant's case was not a

20 matter subject to judicial review.

The Appellant appealed on the ground that the learned judge erred when he dismissed the application because judicial review was the proper course of action considering the fact that the government departments or officers exercised their powers under a statute.

In their submissions, the Respondents argued that the appeal was not properly instituted because it required leave. They cited the case of *Charan v Shah*, 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.

**Held** — The Appellant failed to show the nature of the agreement under which his services were hired. During the hearing, it appeared that the engagement of the Appellant was a tender. There was no evidence showing the terms of the tender, the duration of the engagement and the method of termination. Further, counsel for the Appellant confirmed that he had no copy of the agreement. It appeared that the Respondent accepted the tender but there was no contract executed in which it was based. It would appear that the terms of the tender, once accepted by the Respondent would have formed the contract between them. Unfortunately, the Appellant did not provide a copy of the tender either. Instead, he submitted that the award of a contract may be subject to judicial review because the Major Tenders Board was a statutory body which had to exercise its powers under a statute which created it. The Finance (Supplies and Services) (General) Regulations established the Supplies and Services Board, a Major Tenders Board and a Minor Tenders Board. They may accept or reject tenders. When a tender was accepted, it was the regulations which provide who may execute any contract for the supply of goods and services. There was however nothing to suggest that once this has occurred, the performance of the contract is to be bound by the normal rules of a contract and the Appellant has not been able to prove anything to the contrary. However, the Appellant did not demonstrate otherwise. The case of the Appellant did not involve matters of public law. The remedy available to the Appellant should there have been any challenge as to the manner in which the contract was terminated was an action for breach of contract.

45 Appeal dismissed.

**Cases referred to**

*Josefa Nata v State* [2002] FJCA 75; *Native Land Trust Board v Narawa* [2004] FJSC 7, cited.

50 *Shore Buses Ltd v Minister for Labour and Industrial Relations* [1996] FJCA 7; *Suresh Charan v S M Sha* [1995] 41 FLR 65, distinguished.

*I. Fa* for the Appellant

*J. Udit* and *S. M. Sharma* for the Respondents

5 **Ward P, Eichelbaum and Gallen JJA.** The Appellant company was incorporated in 1993 to carry out work on road patching. However, in 2000, the company acquired a fleet of 3-tonne trucks and water tankers for the use of the Public Works Department and Suva Water Supply.

10 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.
- 15 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.
- 20 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.
- 25 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 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.
- 35 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.
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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.

45 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.

50 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* [1995] 41 FLR 65 (*Charan*), 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 Ltd v Minister for Labour and Industrial Relations* [1996] FJCA 7 (*Shore Buses*), 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 State* [2002] FJCA 75, the court suggested the “order approach” was the proper test in criminal cases. The Supreme Court in *Native Land Trust Board v Narawa* [2004] FJSC 7, 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* and *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  
5 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  
10 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  
15 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.

20 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.

### 25 **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.

### 30 **Order**

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

*Appeal dismissed.*

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