

**HAROON ALI SHAH v CHIEF REGISTRAR (ABU0050 of 2012)**

COURT OF APPEAL — CIVIL JURISDICTION

5 CALANCHINI AP

3,17 September, 8 September, 3 December 2012

10 **Legal Practitioners — ethics — struck from Roll of Practitioners — application for stay pending appeal — special circumstances — exceptional chances of success — balance of convenience — public interest in proceedings — professional discipline — chances of success — Court of Appeal Rules rr 26(3), 34 — Legal Practitioners Decree.**

15 The appellant had been a member of the legal profession for 30 years. The respondent, who is the regulatory authority under the Legal Practitioners Decree 2009, had brought nine complaints against the appellant. The appellant pleaded guilty to three complaints, and the respondent found him guilty in relation to the remaining six. The respondent struck the appellant's name from the Roll of Legal Practitioners. The appellant appealed both the findings of guilt and the penalty imposed by the respondent, and sought a stay  
20 pending the determination of his appeal by the Court of Appeal.

**Held —**

(1) In a stay pending appeal application relating to professional discipline, one factor that is of particular importance is the public interest in the proceeding.

25 (2) For the purpose of determining whether the Court should exercise its discretion to grant a stay, the two questions identified by Marshall JA in *Dorsami Naidu* are of assistance. Those two questions are not mutually exclusive and both may require a consideration of the various factors that were identified by Gates J in *Ward*. The special circumstances of being an impecunious plaintiff unable to repay and a successful foreign plaintiff being overseas are both relevant to money judgments.

30 Application for stay pending appeal is dismissed.

**Cases referred to**

*Dorsami Naidu v The Chief Registrar* (unreported civil appeal ABU 38/10);  
*Stephen Patrick Ward v Yogesh Chandra* (unreported civil appeal CBV 10/10), considered.

35 *New South Wales Bar Association v Stevens* [2003] NSWCA 95; (2003) 52 ATR 602, approved.

*T. Muloilagi* for the Appellant.

40 *L. Vateitei* for the Respondent.

[1] **Calanchini AP.** The Appellant has been a member of the legal profession for 30 years, most of that time as a sole practitioner in the city of Lautoka. He had a substantial civil and criminal practice.

45 [2] The Respondent, who is the regulatory authority under the Legal Practitioners Decree 2009 brought nine complaints against the Appellant. The Appellant pleaded guilty to three of those complaints and on 1 June 2012 the Commission found the Appellant guilty in relation to the remaining six complaints.

50 [3] The proceedings commenced by the Respondent arose out of an initial complaint made by a Mr Bal Ram who together with his daughter instructed the Appellant sometime in the mid to late 1980's to act on the daughter's behalf to

pursue a claim for damages following a motor vehicle accident in which the husband was killed and her children injured. The claim was settled and the Appellant's firm received \$70,000 from the insurance company in May 2001. Neither Mr Bal Ram nor his daughter were informed of the settlement.

5 Eventually, after many enquiries, in 2003 the sum of \$50,000 was paid to Mr Bal Ram, on his daughter's behalf, by a trust account cheque. The sum of \$20,000 had been deducted as legal fees from the settlement sum. The Respondent alleged that the Appellant had failed to obtain written authorisation from either Mr Bal Ram or his daughter for the deduction of \$20,000.

10 [4] It would appear that the \$70,000 banked in May 2001 had been applied for unauthorised purposes and was not recorded in annual trust account certificates provided to the Minister for Justice and the Fiji Law Society.

[5] Following Mr Bal Ram's complaint, the Law Society appointed a special auditor to audit the Appellant's trust account. In his report submitted to the Law Society the special auditor found that (a) the Appellant had failed to keep full accounting records relating to trust monies, (b) the Appellant had drawn cash cheques not marked '*not negotiable*' on his trust account, (c) the Appellant had allowed his trust account to become overdrawn on 30 April 2003, (d) the Appellant failed to keep full accounting records which might explain differences between deposits made to the trust account and receipts raised affecting such deposits and (e) between 1 January 2001 and 20 January 2004 the Appellant did not keep a bank account which was properly designated and evidenced to be a trust account.

20 [6] The original hearing of the complaints took place before Commissioner Connors in January 2012. The hearing ran over three days. Commissioner Connors' term ended before he could write the judgment. In his judgment Commissioner Madigan stated in paragraph 2:

30 *'With the consent of the parties, the evidence and submissions were reviewed and re-heard by recorded video and audio of the original proceedings. This is now the judgment on the counts pursuant to that re-hearing. I am satisfied beyond reasonable doubt that the video viewed and the audio heard is a proper reproduction of the original hearing before Commissioner Connors.'*

[7] On 22 June 2012 the Commission imposed the following penalties:

35 *1. The Chief Registrar strikes the name of Haroon Ali Shah from the Roll of Legal Practitioners.*

*2. The Respondent be permitted to continue in practice for the period of 28 days hereof for the limited purposes of winding up his practice and in the course of that period he is not to make any court appearances or to accept new instructions (be they from existing or new clients).*

40 *3. That the Respondent pay witness expenses amounting to \$1,056.01 to this Commission (as itemised by the Chief Registrar's Office).*

*4. \_ \_ \_*

*5. The Respondent to pay wasted costs of \$7,500 to the Chief Registrar and wasted costs of \$7,500 to this Commission \_ \_ \_ by 31 July 2012.'*

45 [8] Order 5 was made as a result of a finding by the Commission that the Appellant without reasonable explanation had failed to attend the Commission on 25 January and 20 April 2012.

50 [9] The Appellant has appealed both the findings of guilt made on 1 June 2012 and the penalty imposed by the Commission on 22 June 2012 and seeks a stay pending the determination of his appeal by the Court of Appeal.

[10] In accordance with r 26 (3) of the Court of Appeal Rules the Appellant was required to make an initial application for a stay to the court of first instance, in this case, the Commission. That application was made by way of motion dated 17 July 2012. In a written Ruling dated 23 July 2012 the application was refused.

5 [11] By notice of motion dated 23 July 2012 the Appellant has renewed the application in the Court of Appeal pursuant to r 34 of the Rules.

[12] In his amended notice and grounds of appeal the Appellant has raised a total of 21 grounds of appeal, most of which relate to the findings of guilt and which are interspersed with the remaining grounds that relate to penalty. The  
10 amendments to the grounds of appeal relate in the main to the manner in which the re-hearing was conducted by Commissioner Madigan.

[13] In the Appellant's written submissions, three issues were addressed at length. The first issue discussed by the Appellant was the lack of procedural fairness in the trial de novo. The second issue was the lack of due consideration  
15 to the principles of natural justice when disbarring the Appellant for life from his profession. The third issue discussed was the seriousness of the prejudice caused to the Appellant if the appeal succeeds and stay is denied.

[14] The approach that should be adopted by a court to the exercise of its discretion whether to grant a stay pending the determination of an appeal was discussed by Gates CJ sitting as a single judge of the Supreme Court in *Stephen Patrick Ward v Yogesh Chandra* (unreported civil appeal CBV 10 of 2010 delivered on 20 April 2010). The starting point in any stay application is to determine whether the Appellant's circumstances are sufficiently exceptional for  
20 the grant of stay relief pending appeal. In answering that question Gates CJ in the same decision (supra) stated that it was necessary to consider the principles discussed by the Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* (civil appeal ABU 11 of 2004 delivered 18 March 2004).

[15] In general terms, in so far as appeals involving tort or contract cases where a money judgment has resulted, there will be no stay except in special or exceptional circumstances. Even then, in the rare case when a stay may be allowed, a condition of the stay is usually imposed that the judgment amount should be brought into court.

[16] In *Dorsami Naidu v The Chief Registrar* (unreported civil appeal ABU 38 of 2010 delivered 2 March 2011) Marshall JA in a single judge Ruling commented on the issue of the chances of success being a factor in considering a stay application. The learned judge concluded that strong grounds of appeal have no impact upon a stay being granted and that such a factor does not constitute a special circumstance. In reaching that conclusion, Marshall JA made reference to *Atkins v Great Western Railway* (1885 – 86) 2 Times Law Reports  
40 400 and in particular to the observation of Lord Esher MR:

*'strong grounds of appeal is no reason for no one ought to appeal without strong grounds for doing so.'*

45 [17] The best that can be said about this factor is that when it has been established that there are exceptional chances of success, that matter may become a special circumstance which when considered with the other principles may justify the grant of a stay pending appeal.

50 [18] In the **Dorsami Naidu** decision (supra) Marshall JA considered the position of stay when a regulator, such as Chief Registrar, representing the public interest has succeeded at first instance. It is, of course, apparent that the factor of

public interest is not usually relevant in cases where the stay application relates to a money judgment. However, the learned judge concluded that there was no reason why the strict rules applying to the exercise of the discretion to grant a stay should be applied differently to a Plaintiff who is the regulator in professional discipline cases. Just as a successful plaintiff in a money judgment case should not be kept out of the fruits of his judgment, a regulator representing the public interest in professional discipline cases is even more so entitled to rely on the same rule.

5 [19] In discussing convenience and balance, it is sufficient to refer to the observations of Spigelman CJ in *New South Wales Bar Association v Stevens* [2003] NSWCA 95; (2003) 52 ATR 602.

[20] In relation to the balance of convenience, Spigelman CJ at paragraph 114 noted:

15 *'The injury to the public arising from the continuation in practice of a person unfit to do so is not comparable to the detriment to the practitioner from being prevented from practising. These matters are not measurable on the same scale, although they are both entitled to weight. Terminology such as 'balance of convenience' is not apt. It is likely to lead to failure to consider the public interest.'*

20 [21] Further in relation to preserving the status quo, Spigelman CJ stated at paragraph 115:

*'Where the public interest is engaged the status quo has no particular significance. There is not presumption in favour of the continuation of the status quo in such a context.'*

25 [22] From what has been said in the preceding paragraphs it is apparent that in a stay pending appeal application relating to professional discipline one factor of those identified by Gates CJ in the **Ward** decision (supra) that is of particular importance is the public interest in the proceeding.

30 [23] For the purpose of determining whether I should exercise a discretion to grant a stay in the present application, I consider the two questions identified by Marshall JA in the **Dorsami Naidu** Ruling (supra) to be of assistance. At page 10 of the Ruling the two tests or questions were posed as follows:

35 *'(1) Is there proven a special circumstance which stands in the way of the regulator, successful at first instance, whose position is strengthened by representing an important public interest, from enforcing the fruits of his judgment?*

*(2) Are there special or exceptional chances of success with regard to the practitioners appeal?'*

40 [24] In my judgment the two questions are not mutually exclusive and both may require a consideration of the various factors that were identified by Gates CJ in the **Ward** decision (supra). The special circumstances of (i) an impecunious plaintiff unable to repay and (ii) a successful foreign plaintiff being overseas are both relevant to money judgments. The Appellant has not identified any other special circumstance.

45 [25] Turning to the chances of success. At the best the appeal may be described as arguable. In his oral submissions Counsel for the Appellant relied vigorously on the ground that the Appellant was entitled to receive and the Commission was obliged to conduct a re-hearing in the form of a *'de novo hearing.'* It is clear from a reading of the transcript that the Commission correctly offered the Appellant a choice of three options. It is arguable that the Appellant chose and willingly participated in the format of the re-hearing that took place. If there is any

ambiguity in the transcript, it is a matter for the Court of Appeal. However on my reading of the transcript the chances of success fall well short of the special or exceptional chances that the authorities suggest must be established for a stay.

[26] As a result I have concluded that the application for a stay must be refused.

5 The application for stay is dismissed. The Appellant is ordered to pay the costs of the Respondent which are assessed in the sum of \$1,500 within 28 days from the date of this decision.

[27] I make the following orders:

- 10 *1. The application for stay pending appeal is dismissed.*  
*2. The Appellant is ordered to pay costs assessed at \$1,500 to the Respondent within 28 days.*

*Application dismissed.*

15

20

25

30

35

40

45

50