

IN THE COURT OF APPEAL FIJI
[CIVIL APPELLATE JURISDICTION]

Misc.Action 2 of 2016
(ILSC Matter No. 006.2015)

BETWEEN : **THE CHIEF REGISTRAR** *Applicant*

AND : **TERESIA RIGSBY** *Respondent*

Coram : **Calanchini, P**
Basnayake, JA
Almeida Guneratne, JA

Counsel : **Mr. A. Chand for the Applicant**
Respondent in Person

Date of Hearing : **10 November 2016**

Date of Judgment : **29 November 2016**

JUDGMENT

Calanchini, P

[1] I have had the advantage of reading the draft judgment of Guneratne JA and agree with his conclusion that the Court of Appeal does not have jurisdiction to determine the reference from the Independent Legal Services Commissioner (the Commissioner). In doing so I also agree with his Lordship that section 15 of the Court of Appeal Act Cap 12 (the Act) allows a Judge of the High Court and not any other judicial officer to refer to the Court of Appeal a question of law for determination as a case stated. I also agree that the Commissioner does not come within the definition of Judge for the purposes of section 15 (see section 2 of the Interpretation Act Cap 7). On that note it was surprising

that both counsel who appeared at the hearing before the Court were of the view that the Commissioner was a Judge of the High Court for the purposes of section 15. Although section 85 of the Legal Practitioners Decree 2009 (the Decree) specifies that the Commissioner must be qualified for appointment as a judge and although section 118 of the Decree gives to the Commissioner the same privileges and immunities as a Judge of the High Court, neither section has the effect of appointing the Commissioner as a Judge of the High Court. The oath or affirmation that is taken on appointment is that of a Commissioner and not that of a Judge of the High Court.

- [2] The purported reference under section 15 of the Act raises a further issue to which his Lordship alluded. It is apparent from the material that the proceedings before the Commission had been completed by the time the reference was directed to the Court of Appeal. In my view section 15 of the Act contemplates a situation where in the course of pending proceedings a point of law arises and where the questions which have been referred will decide the outcome of some or all of the issues in the proceedings in the High Court. Section 15 is not intended to permit the Court of Appeal to determine the reference in order to give an advisory opinion on hypothetical or academic questions. If there was any issue concerning the date of the Ruling the subject matter of the reference then it was a matter that should have been taken on appeal to this Court by one or other of the parties to the proceedings before the Commission under section 128 of the Decree. The circumstances under which a Judge of the High Court may invoke section 15 of the Act and the procedures that should be followed in doing so were discussed by Gates J (as then was) in **Mahendra Pal Chaudhary –v- Laisenia Qarase and Others** (HBC 282 of 2001(L); 24 April 2002). For all of the above and for the reasons stated by Guneratne JA the Court should decline to determine the reference by way of case stated.

Basnayake, JA

- [3] I agree with the reasoning and conclusions of Almeida Guneratne JA.

Almeida Guneratne, JA

Nature of the Present Matter

- [4] This matter comes up before this Court consequent to a reference by the present Commissioner of the Independent Legal Services Commission, (hereinafter referred to as the Commissioner) appointed under the Legal Practitioners Decree, 2009 (the Decree) as a case stated for determination pursuant to Section 15 of the Court of Appeal Act.
- [5] Upon such reference being made the President of the Court listed the reference for hearing to determine whether first, there was any legal basis or jurisdiction for the Commissioner to solicit a response from this Court as a case stated and secondly, as to whether this court has jurisdiction to state a case upon the said reference made to it by the Commissioner.

The Background facts and the Particular Dispute between the parties

- [6] The Respondent had pleaded guilty to a charge of professional misconduct in terms of the Decree She was suspended from practice for one month and imposed with a fine of \$500 which she paid.
- [7] The order of the Commissioner (the former Commissioner) was signed on 3rd December, 2015 whereas he had resigned from office with effect from 30th November, 2015.

The Matter referred to this Court for Determination as a Case stated

- [8] The matter referred to this Court for determination hinges on one principal issue, that is, the former Commissioner having resigned from office with effect from 30th November 2015, whether he was '*functus officio*' when he signed the impugned order on 3rd December, 2015.

A Fundamental issue relating to Jurisdiction

- [9] That fundamental issue relating to Jurisdiction as recounted above stems from a consideration of several provisions of the Statute law in Fiji which I shall now proceed to examine.

Section 15 of the Court of Appeal Act

- [10] Section 15 of the Court of Appeal Act Cap.12 decrees thus:

“15. In addition and without prejudice to the right of appeal conferred by this Part, a judge of the High Court may reserve for consideration by the Court of Appeal, on a case to be stated by him, any question of law which may arise on the trial of any cause or matter, and may give any judgment or decision, subject to the opinion of the Court of Appeal, and the Court of Appeal shall have power to hear and determine every such questions.”

- [11] On a plain reading of that provision it is clear that, only the High Court has the statutory right to refer to the Court of Appeal a question of law for a determination as a case stated.
- [12] If so, that right being the edifice on which this Court could assume Jurisdiction to determine the question referred to is by way of a case stated in the absence of the same, this Court cannot assume such Jurisdiction.
- [13] I have examined the High Court Act Cap 13 (the Act) which is the only statute that defines a “Judge” and that is confined to a High Court Judge (Vide: Section 2 of the High Court Act).
- [14] The Decree under which the Commissioner is vested with Jurisdiction to function does not define “a Judge”.

- [15] The Constitution of Fiji defines “Judge” and makes a distinction between “Judge” and “a Judicial Officer” in Section 163(1) thereof.
- [16] The point I am compelled to make is that, none of the said statutes and the Constitution have extended the meaning of a “a Judge” to include “a Commissioner” functioning under the Decree.
- [17] I also looked at Section 85(2) and Section 118 of the Decree to see whether there is anything therein that could put a different complexion on the matter.
- [18] But I could see none in as much as those provisions touch on the immunity afforded to a Commissioner under the Decree in the discharge of his functions and the qualifications applicable to the appointment of a Commissioner under the Decree.
- [19] Those provisions do not make a Commissioner appointed under the Decree a Judge entitling him to invoke the jurisdiction of this Court to consider a question of law as a case stated for its determination.
- [20] Accordingly, I see no legal basis to deal with the Respondent’s arguments based on the principle of “functus officio” and the antecedent facts relating thereto.
- [21] That, in my view, cannot be pre-empted by way of a case stated by the Commissioner for determination by this Court.

Conclusion

- [22] For the aforesaid reasons I would hold that, there is no basis for this Court to determine as a case stated the matter referred to it by the Commissioner.

Orders of the Court:

The Reference made by the Commissioner appointed under the Legal Practitioners Decree purporting to do so under Section 15 of the Court of Appeal Act (Cap.12) as a case stated for this Court to determine is declined.

W. Calanchini

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Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL



E. L. Basnayake

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Hon. Justice E. L. Basnayake
JUSTICE OF APPEAL

Almeida Guneratne

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL