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

CIVIL APPEAL ABU 86 of 2014
(ILSC No. 29 of 2013)

BETWEEN : **CHIEF REGISTRAR**

Appellant

AND : **DEVANESH PRAKASH SHARMA**

First Respondent

AND : **R. PATEL LAWYERS**

Second Respondent

Coram : **Calanchini P**

Counsel : **Mr V Sharma for the Appellant**
Mr P Sharma for the Respondents

Date of Hearing : **28 July 2015**

Date of Ruling : **27 January 2016**

RULING

[1] This is an application by the Respondents for an order that, amongst others, the appeal be struck out and dismissed on the basis that it is out of time and filed without obtaining leave.

[2] The application was made by summons filed on 16 April 2015 and was supported by an affidavit sworn on 16 April 2015 by Lemeki Sevutia. The application was opposed. The Appellant did not file an answering affidavit. Both parties filed written submissions prior to the hearing.

[3] The jurisdiction of the Court of Appeal to hear and determine this application is derived from the Rules of the High Court by virtue of section 13 of the Court of Appeal Act Cap 12 (the Act) which provides:

> *"For all the purposes of and incidental to the hearing and determination of any appeal under this Part _ _ _ the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of court."*

[4] The Court's jurisdiction to enlarge time may be exercised by a justice of appeal pursuant to section 20(1) (k) of the Act which provides that:

> *"20(1) A judge of the Court may exercise the following powers of the Court:*
> *(a) – (j) _ _ _*
> *(k) generally to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal."*

[5] The First Respondent (the practitioner) is a partner in the law firm named as the Second Respondent (the firm). On 15 June 2011 an aggrieved client of the firm and the practitioner in particular laid a complaint against both Respondents with the Appellant. The practitioner had been acting for the aggrieved client in a matrimonial dispute. On 27 November 2013 the Appellant filed charges against both Respondents. There were seven counts alleging various acts of professional misconduct under section 82(1)(a) and 82(1)(b) of the Legal Practitioners Decree 2009. On 3 March 2014 the Appellant filed *"Amended Charges"* against both Respondents. The amended charges consisted of 3 counts of professional misconduct under the Decree. The original charges were not withdrawn.

[6] By notice of motion dated 20 March 2014 the Respondents sought an order from the Commission that *"the charges filed by the Chief Registrar on 27 November 2013 and 3 March 2014 against the Respondents be permanently stayed and/or dismissed and/or_ _ _."* In a Ruling delivered on 12 November 2014 the Commission found that there had been abuse of powers by the Appellant. The proceedings were ordered to be *"stayed and the charges before the Commission"* were struck out.

[7] Being dissatisfied with the Commission's orders the Appellant filed a notice of appeal on 22 December 2014. The Appellant's notice of appeal seeks an order from the Court of Appeal that the Ruling of the Independent Legal Services Commission dated 12 November 2014 be wholly set aside and sets out 28 grounds of appeal upon which the Appellant relies in support of the appeal.

[8] The notice of appeal was served on the Respondents on 22 December 2014.

[9] It is that notice of appeal that is the subject of the present application. The Respondents seek an order that the appeal be struck out and dismissed on the basis that leave was not obtained under section 12(2)(f) of the Act and on the basis that the notice of appeal was filed and served out of time and contrary to Rule 16 of the Court of Appeal Rules (the Rules). Both these grounds rest on the conclusion that the Commission's Ruling was an Interlocutory Ruling. If that is correct then the Appellant, was required to obtain leave in accordance with section 12(2) (f) of the Act and Rule 26(3) of the Rules. Under Rule 16 the Appellant was required to commence the appeal process within 21 days from the date of pronouncement of the Ruling. In this case time expired on 2 December 2014.

[10] The Appellant submits that neither the leave requirement nor the 21 days limit apply in this case. The Appellant submits that the right to appeal under section 128 of the Legal Practitioners Decree 2009 gives an unfettered right of appeal. The Appellant submits that in any event the Ruling dated 12 November 2014 constituted an exception to the applications approach for determining when a decision was final or interlocutory and should therefore be regarded as a final judgment.

[11] The application and the submissions raise a number of issues that need to be considered.

[12] The first issue concerns the order sought by the Respondents. It is sufficient to indicate at this stage that even if the Respondents' submissions were upheld, it would not be appropriate to dismiss the appeal. There is no reason why, in the event of a finding against the Appellant that the Chief Registrar should not be at liberty to apply for leave to appeal and to apply for an enlargement of time. If the application is successful the present appeal would be struck out rather than dismissed. Furthermore I am not entirely satisfied that the power of the Court of Appeal to dismiss an appeal can be exercised by a justice of appeal when determining an application pursuant to section 20(1)(k) of the Act.

[13] The substantive issue raised by the Appellant is of some importance when an appellant is exercising a statutory right of appeal to the Court of Appeal pursuant to a provision other than that for which provision is made in the Court of Appeal Act. This issue must be considered in the context of the right to appeal. The right to appeal is always a creation of statute. There was never a common law right to appeal. It follows that the extent of that right of appeal and how it is to be exercised can only be ascertained by examining the statute that created the right of appeal. Section 12 of the Court of Appeal Act applies only to the right to appeal from decisions of the High Court. Other statutes do create a right of appeal to the Court of Appeal. Apart from section 128 of the Legal Practitioners Decree, section 245 of the Employment Relations Promulgation gives a right of appeal to the Court of Appeal from decisions of the Employment Court. Furthermore, an appeal from the Tax Court lies to the Court of Appeal under the Tax Administration Decree 2009. There are other examples of a similar right of appeal to be found in the written laws of Fiji.

[14] Since the right to appeal from a decision of the Independent Legal Services Commission is given by the Legal Practitioners Decree, it is to that Decree that reference must be made to determine the nature and the extent of that right of appeal. Section 128 of the Decree provides as follows:

"(1) An appeal shall lie to the Court of Appeal from any order of the Commission at the instance of either the Registrar or any other party to the proceeding.

(2) Such appeal shall be made within such time and in such form and shall be heard in such manner as shall be prescribed by the rules of procedure made under section 127."

[15] It is sufficient to note that so far as section 128(2) is concerned the Commission has not made any rules of procedure pursuant to the powers given to it under section 127 of the Decree.

[16] The right to appeal given to either the Registrar or any other party is a right to appeal from any order of the Commission. There are no limitations or restrictions imposed by section 128(1) in terms of which orders or what types of orders. It would appear that the right of appeal against any order applies equally to both final and interlocutory orders, without any requirement to obtain leave in respect of the latter. There is no reference to the Court of Appeal Act in section 128(1) of the Decree. In my judgment the right to appeal any order of the Commission under section 128 of the Decree cannot be made subject to a requirement to obtain leave in respect of interlocutory orders as is the case under section 12 of the Court of Appeal Act in respect of interlocutory orders of the High Court. On that point I find in favour of the Appellant.

[17] However the position is quite different in relation to the rules that are to be applied in respect of time limits for appealing and the form of such appeals. As noted earlier the Commission has not made any rules of procedure for appeals from its orders to the Court of Appeal. I have no hesitation in reaching the conclusion that in the absence of any such Rules and in order to give efficacy to such appeals, the Court of Appeal Rules must apply to appeals under section 128 of the Decree. As a result it is necessary to consider Rule 16 of the Rules which states:

"Subject to the provisions of this Rule, every notice of appeal shall be filed and served _ _ _ within the following period (calculated from the date on which the judgment or order of the Court below was pronounced) that is to say

(a) in the case of an appeal from an interlocutory order, 21 days;

(b) in any other case, 6 weeks."

[18] It follows that in the event that the Ruling delivered by the Commission on 12 November 2014 was an interlocutory judgment then the Appellant was required to file and serve the notice of appeal within 21 days from 12 November 2014, being 3 December 2014. The notice was not filed and served until 22 December 2014. It was filed and served late, being out of time by 19 days. The Appellant has not applied for an enlargement of time.

[19] The test for determining whether a judgment or order is final or interlocutory was settled by the Court of Appeal in **Goundar –v- The Minister for Health** (ABU 75 of 2008; 9 July 2008). In paragraphs 37 and 38 the Court said:

> *"37. This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.*
>
> *38. Every other application to the High Court should be considered interlocutory_ _ _. The following are examples of interlocutory applications :*
>
> *1. an application to stay proceedings;".*

[20] For the purpose of determining the time for filing and serving a notice of appeal under Rule 16 the test set out by this Court in **Goundar** (above) should be applied to an appeal against the decision of the Commission in the same way. On the basis of the decision in **Goundar**, the Commission's Ruling was an interlocutory Ruling.

[21] Unlike under section 245 of the Employment Relations Promulgation where a 28 day time limit is provided for appeals from the Employment Court, section 128 of the Decree makes no provision for filing and serving a notice of appeal within a specified time limit.

[22] The test adopted by the Court of Appeal in **Goundar** (supra) is referred to as the "*application*" test. The Appellant submits that the decision of the Commission should be regarded as an exception to that test and that it should be regarded as final. If that

were the case then the filing and serving of the notice of appeal was effected in compliance with the 42 days allowed under Rule 16.

[23] However, to the extent that there is an exception to the "*application*" test, that exception arises in the context of a split hearing. In **White v Brunton** [1984] 1 QB 570 Donaldson MR stated at page 573:

> *"I would therefore hold that where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party may appeal without leave, against an order made at the end of one part if he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the completed hearing."*

[24] The exception has the effect of allowing an appeal against an order made as part of a split hearing to be regarded as an appeal against a final judgment. As a result leave is not required and the time limit for appealing is the same as for a final judgment.

[25] In my opinion the exception does not apply in this case. The application came before the Commissioner as an interlocutory application and not as a preliminary issue raised either under the Rules of procedure or as the first part of a split final hearing. As a result I do not accept the Appellant's submission.

[26] To the extent that an order staying proceedings and an order striking out all the charges in those proceedings before the Commission are capable of standing together then it must be recalled that an order staying proceedings does not discontinue the proceedings. A stay order has the effect of maintaining the position reached in the proceedings when the stay order was made. A stay order is usually ordered to prevent an injustice being done. The proceedings may take their normal course if and when there are grounds for the Commission to lift the stay order.

[27] In conclusion the appeal is an appeal against an interlocutory order of the Commission and was required to be filed and served within 21 days from the date of pronouncement. It has been filed and served out of time. It is not validly before the Court of Appeal and must be struck out. The Respondents are entitled to costs of the

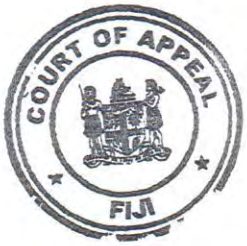
application which was fixed summarily in the sum of $1800.00 to be paid within 21 days from the date of this Ruling.

Orders:

1. *Application is allowed.*

2. *The notice of appeal filed on 22 December 2014 is struck out.*

3. *The Appellant is to pay costs of $1800.00 to the Respondents within 21 days from the date of this Ruling.*



W. Calanchini

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