

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

CIVIL APPEAL NO. ABU 135 OF 2016
(Independent Legal Services Commission No. 006 of 2015)

BETWEEN : TERESIA RIGSBY
Appellant

AND : CHIEF REGISTRAR OF THE HIGH COURT
Respondent

Coram : Chandra RJA

Counsel : Appellant in person
Mr. A. Chand for the Respondent

Date of Hearing : 16 May 2017

Date of Ruling: 20 June 2017

RULING

[1] This is an application seeking leave to appeal out of time the decision of the Independent Legal Service Commission dated 3rd December 2015.

[2] On the 22nd of September 2015 the Applicant was charged with one count of professional misconduct for failure to respond to a complaint by one Umesh Narayan.

- [3] The Applicant appeared before the Commissioner of the Independent Legal Services Commission (ILSC) on the 22nd and 29th of October 2015 and admitted the charge against her.
- [4] By Judgment dated 3rd December 2015 the Commissioner of ILSC had made order imposing a fine of \$500 on the Applicant and suspending her from practice for one month and to resume practice if the fine was paid.
- [5] The Commissioner of the ILSC who held the inquiry and who had given the judgment was Justice Madigan who had resigned from the position of Commissioner with effect from 30th November 2015.
- [6] By notice dated 30th May 2016 the parties were required to appear before the present Commissioner on 7th June 2016.
- [7] On 7th June 2016 the Commissioner had wanted to hear from both parties on the issue of *functus officio* on the premise that the former Commissioner had resigned from the position of Commissioner with effect from 30th November 2015 and had left Fiji on 1st December 2015 whilst the judgment in the matter was dated and distributed to the parties on 3rd December 2015.
- [8] Both parties had filed submissions on 13th June 2016 and the Commissioner thereupon had written to the President, Court of Appeal by way of letter dated 15th June 2016 referring the matter as a Case Stated to the Court of Appeal. The issues raised were:
- (a) Was the previous Commissioner, Justice P.K.Madigan, *functus officio* in so far as the handing down of the judgment and Orders in this matter on 3rd December 2015.
- (b) If yes, what was the effect of Justice P.K.Madigan being *functus officio* upon the judgment and Orders made in this manner on 3rd December 2015, that is:
- 1) Are they still valid?
 - 2) In the alternative, are they null, void and of no effect?

(c) If the effect upon the judgment and Orders made in this matter on 3rd December 2015 of Justice P.K.Madigan being *functus officio* is that they are null, void and of no effect, then should the matter be referred back to the Commission for re-hearing?

- [9] The matter referred as case stated before the Court of Appeal was Miscellaneous Application No.2 of 2016 and was heard by the Court of Appeal Full Bench on 10th November 2016 and judgment was delivered on 29th November 2016.
- [10] The Court of Appeal declined the referral by the Commissioner as case stated on the basis that the Court of Appeal did not have jurisdiction to determine the case stated on a matter that was referred by the Commissioner of the ILSC as the Commissioner was not a judge and as such the Commissioner cannot refer the matters for case stated pursuant to section 15 of the Court of Appeal Act.
- [11] After the judgment of the Court of Appeal the matter was called before the Commissioner of the ILSC on 5th November 2016 and parties were required to make oral submissions on what he should do with the judgment delivered by the former Commissioner.
- [12] After hearing the parties, the Commissioner gave directions to the Applicant to file her application for leave out of time at the Court of Appeal Registry by the 7th of December 2016.
- [13] The Applicant filed her application for leave to appeal out of time to the Court of Appeal on 7th December 2016 and the Commissioner proceeded to grant a stay of the publication and distribution of the ILSC judgment until determination of the Court of Appeal matter and further gave orders for the ILSC judgment not to be forwarded on *paclii* without order of the Commission.
- [14] The sequence of events set out above presents a rather unusual situation in respect of the present application as it is a situation where the inquiry had been proceeded with, and the person charged had pleaded guilty but the judgment given became questionable as the Commissioner who heard the matter was *functus officio* at the time of delivery of the judgment, as he had resigned prior to the date of the judgment.

- [15] It is in these circumstances that the application of the Applicant has to be considered.
- [16] The factors that have to be taken into account has been well settled in applications seeking leave to appeal out of time. In NLTB v Ahmed Khan and Another (CBV 2 of 2013, 15th March 2013) these factors were set out as follows:
- (a) the length of the delay;
 - (b) the reasons for the delay;
 - (c) whether there is a ground of merit justifying the appellate court's consideration or, whether there has been substantial delay, nonetheless is there a ground that will probably succeed;
 - (d) if time is enlarged with the respondent be unfairly prejudiced.

The length of the delay

- [17] In the present case, since the date of the judgment against which the appeal is sought is 3rd December 2015, time would start to run from that date. The Respondent has submitted that it should be from 30th May 2016 which is from the date that the Applicant is said to have been made aware of the former Commissioner's resignation. The intended appeal is against the judgment of 3rd December 2016, therefore the time should be reckoned from that date. As the application seeking leave to appeal out of time was filed on the 7th December 2016 there has been a delay of almost 11 months in filing same.

Reasons for the delay

- [18] The Respondent has submitted that the Applicant has not provided any reason for the delay. But the affidavit filed by the Applicant sets out the sequence of events that led to the filing of the application seeking leave to appeal out of time. These have been set out above and the reasons for the delay has been due to the fact that the matter had been

referred by the present Commissioner to the Court of Appeal as a case stated and the Court of Appeal had considered the matter and made a decision regarding same. Till such time as the matter was pending before the Court of Appeal, the Applicant could not have taken any steps. The effect of the impugned judgment was still in doubt after the Court of Appeal decision on the referral.

- [19] On receiving the Court of Appeal decision the Commissioner took the further step of calling the parties, hearing them and then requesting the Applicant to file an application seeking leave to appeal out of time. In those circumstances, the Applicant could not have made an application challenging the impugned judgment as she had to see what steps the present Commissioner would take regarding her matter where she had pleaded guilty to the charge against her.
- [20] Therefore the reason for the delay is quite clear considering the sequence of events that took place and the delay is excusable.

Whether there is a ground of merit

- [21] Notwithstanding the delay is there merit in the appeal?
- [22] The question at issue is the legal validity of the judgment given on 3rd December 2015. It had been given when the former Commissioner was functus officio as he had resigned on 30th November 2015.
- [23] The Applicant's contention is that the question regarding validity of the impugned judgment is arguable. It is premised on the basis that the impugned judgment is a nullity. Nothing can flow from a nullity and therefore it is a matter that is arguable.
- [24] The Respondent has submitted that even if it is found that the former Commissioner was functus, it could be rectified by the application of the slips rule being an exception to the functus officio principle and has cited the decision in Chandler v Alberta Association of Architects [1989] 2SCR 848, 1989 CanLII 41 (SCC).

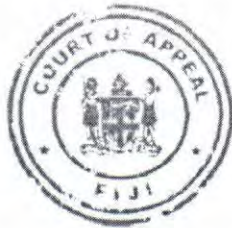
- [25] The situation that was in Chandler is quite different from the present situation and cannot be made use of. The slips rule can be applied where there has been a clerical error whereas the present situation is not as a result of a clerical error.
- [26] The present situation is one where it has to be decided whether the impugned judgment has any legal validity which is an arguable question.

The degree of prejudice to the Respondent if the application is granted

- [27] The Respondent has submitted that prejudice would be caused if it became necessary to re-litigate this matter. The Respondent has also stated in the written submissions that since the Applicant has pleaded guilty to the charge and has also complied with the order and paid the fine, the unequivocal plea of guilt would not change.
- [28] The question to be considered is the effect of a judgment given by the former Commissioner when he was functus officio. Whatever the nature of the proceedings that had been there prior to the giving of the judgment, it is the validity of the judgment that was given which is under consideration
- [29] The question as to whether any injustice would be caused to the Applicant if leave is not granted would also have to be considered.
- [30] It is the submission of the Respondent that, since the Applicant had pleaded guilty and complied with the order no injustice would be caused to her.
- [31] The issue to be considered is as to the outcome of the inquiry faced by the Applicant when the judgment given against her is questionable. It would be a situation where proceedings have been concluded and the Applicant is still waiting for a decision and in that respect there is injustice caused to the Applicant.
- [32] In the above circumstances, leave to appeal out of time is granted to the Applicant.

Orders of Court

- (1) Leave to appeal out of time is granted;*
- (2) The Applicant must file and serve a notice of appeal on the Respondent within 21 days from the date of this Ruling;*
- (3) There shall be no costs.*



S. Chandra

Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL