IN THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

Appeal No. HBA 15 of 2016

IN THE MATTER of an appeal from the order of the Medical and Dental Professional Conduct Tribunal in MDT No. 1 of 2015.

BETWEEN

LITIANA BROWNE

APPELLANT

AND

FIJI MEDICAL COUNCIL

RESPONDENT

Counsel	:	Ms. L. Jackson for the Appellant
		Ms. N. Tikoisuva for the Respondent
Date of Hearing	:	14th October 2016

Date of Order : 14th November 2016

ORDER

(On the application for stay pending appeal)

[1] The Medical and Dental Professional Conduct Tribunal (the tribunal) in its decision dated 08th July, 2016 made the following orders against the appellant;

1. That the appellant be censured.
2. That the appellant pay the Fiji Medical Council a fine of $5000.00 within 30 days from the date of the decision.
3. That the appellant's registration be cancelled, her licence be revoked and the appellant be disqualified from being registered generally for a period of ten (10) years with effect from the date of the decision.

[2] The appellant preferred and appeal from the decision of the tribunal and sought an order staying the operation of the decision appealed against until the appeal is determined finally.

[3] The factual background of the matter as established by the evidence of the husband and the daughter of the deceased is briefly as follows. On 19th April 2012 the deceased Shanta Wati Krishna was seen by the appellant with a history of post-menopausal bleeding. On 30th April, 2012 the appellant performed a Total Abdominal Hysterectomy, without first confirming whether she had a cancer by an endometrial biopsy. The deceased was discharged on 3rd May, 2012 but she was having abdominal pain, nausea, body pain and occasional vomiting. The deceased was readmitted to the Suva Private Hospital on 5th May 2012 with the same symptoms and later transferred to the Colonial War Memorial Hospital where she passed away on 4th July, 2012.

[4] As submitted by the learned counsel for the appellant there are no previous decisions setting down guidelines to follow in deciding whether the operation of a decision of the Medical and Dental Professional Conduct Tribunal should be stayed pending appeal.

[5] In **Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd** [2005] FJCA13; ABU 0011.2004s (18 March 2005) it was held that the following principles can be applied in granting or refusing an application for the stay of a judgment pending appeal;

(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).
(b) Whether the successful party will be injuriously affected by the stay.
(c) The bona fides of the applicants as to the prosecution of the appeal.
(d) The effect on third parties.
(e) The novelty and importance of questions involved.
(f) The public interest in the proceeding.
(g) The overall balance of convenience and the status quo."

[6] The circumstances under which the above principles were formulated are different to that of the case before this court. However, some of the principles laid down in that case can be used as guidelines in deciding whether the stay should be granted.

[7] In the case of **Khan v Chief Registrar** [2014] FJCA 60; ABU68.2013 (23 May 2014) the Court of Appeal made the following observations;

> It follows that a legal practitioner in the position of the Appellant must show that there is a cogent reason constituting special circumstances to justify granting a stay. As Chesterman J in Legal Services Commissioner -v- Baker [2005] QCA 482 at paragraph 28 observed:
>
> > "In particular it should be accepted that an application for a stay of a recommendation that his name be removed from the roll of Legal Practitioners should show a cogent reason for the stay, and he will not do so merely by showing that he will be unable to practise his profession until his appeal is heard and allowed. Every practitioner who is suspended from practice or whose name is removed from the roll suffers that prejudice but it is clearly not right that a stay is, or should be granted as a matter of course. Something more must be shown than must be such as (to) outweigh the public interest in

having unfit practitioners debarred from practice. That interest is to be afforded particular significance."

[8] In view of the principles laid down in the cases cited above the court must ascertain whether the appellant has grounds of appeal which she has a chance of success. At the very outset I must say that the responsibility of a medical professional towards his or her clients is very much higher than that of any other professional.

[9] The appeal of the appellant is based on several grounds of appeal. The learned counsel for the appellant submitted that the learned tribunal erred in fact and in law when required the counsel for the appellant to plead in mitigation during her closing submissions on the substantive matter which gave the impression that the tribunal had pre-determined the case. If the tribunal had pre-determined the case it would be a very strong ground of appeal. However, the mere fact of requesting the counsel to submit in mitigation in the course of her closing submissions is not sufficient for the court to vitiate the findings of the tribunal unless it is reflected in its decision that the tribunal had pre-determined the matter.

[10] In an application for stay pending appeal although the court is not expected to consider the appeal on its merits it is called upon to decide whether there are strong grounds of appeal which will have the effect of vitiating the findings of the lower court. In doing so the court must consider merits of the appeal bordering its final decision.

[11] It appears from the order of the tribunal that it has considered the evidence before arriving at the findings. The way the proceedings have been conducted it cannot be said that the tribunal had pre-determined the matter before it. It is also pertinent to note that this is a decision of all three members of the tribunal and not only of the president alone.

[12] It is also important to note that the Chairman of the tribunal has requested the counsel for the appellant to plead in mitigation after hearing the evidence of both parties. Submissions are not evidence and the parties are permitted to make submissions for the sole purpose of assisting the tribunal. I am therefore, of the view that asking the counsel to make submissions in mitigation in the course of the closing submissions does not amount to predetermining the case.

[13] Therefore, the fact that the President of the tribunal required the counsel for the appellant to plead in mitigation in the course her closing submissions cannot be considered as a strong ground of appeal which is sufficient for the court to suspend the operation of the order of the tribunal pending appeal.

[14] The learned counsel submitted that the tribunal erred in rejecting the appellant's initial consultation notes.

[15] Section 79(6)(a) & (b) of the Medical and Dental Practitioner Decree 2010 provides:

> The Tribunal –
>
> (a) is not bound by the rules of evidence and may inform itself on any matter as it thinks fit; and
> (b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

[16] Section 79(6)(a) of the Medical and Dental Practitioner Decree 2010 confers a discretion upon the tribunal to admit evidence which are otherwise not admissible. This does not mean that the tribunal is bound to admit every document or every piece of evidence sought to be tendered by the parties. In this case the document has been rejected by the tribunal on the grounds stated in paragraph 49 of the order. The appellant's counsel has not stated in her submissions how the rejection of the document affected the appellant's case. Whether the reasons given by the members of the tribunal in rejecting the document in question are sufficient and how it affected appellant's rights, are matters which should be decided at the hearing of the appeal. On materials available to this court I cannot see any merit in the allegation that the tribunal has erred in rejecting the said document.

[17] The learned counsel for the appellant submitted that the finding of the tribunal that "the best reason for the hysterectomy was a cancer" was incorrect because the total abdominal hysterectomy was done to stop post-menopausal bleeding. The learned counsel highlighted the observation of the tribunal that if there was any evidence that it was not cancer then any good doctor would have said that there was no need for hysterectomy. It is also the submission of the learned counsel for the appellant

that the tribunal has taken two contradictory positions that is that the deceased did not have a cancer and that the possibility of having a cancer was low.

[18] There is merit in this argument but it is not sufficient for the court to stay the operation of the order of the tribunal for the reason that the death was not caused due the hysterectomy surgery but due to post surgical complications.

[19] In paragraph 109 of the order the tribunal states thus;

> Since there is no plausible evidence that the respondent has advised the deceased of the risks associated with a hysterectomy, the tribunal finds the respondent cannot exonerate herself from the flow on consequences of that operation. These are best described in the evidence of Dr. Fong, PW4, when he testified, "In absence of documentation of how adhesions were managed one cannot be confident in saying that the bowel was not injured while it was being dealt with". He goes on to say that "the bowel injury occurred during the hysterectomy". This would be considered as medical negligence anywhere.

[20] The appellant did not seek to challenge the above finding of the tribunal. Nothing is mentioned by the appellant on these findings of the tribunal in her affidavit or in the submissions of the learned counsel for the appellant. The learned counsel submitted that since there was no post-mortem examination done, there was no evidence before the tribunal to arrive at the conclusion that it was the total abdominal hysterectomy that caused the death of the deceased. I am not going to discuss this in detail at this stage of the case because it is a matter that should be considered at the hearing of the appeal. The facts establish that from the time the deceased was admitted to Suva Private Hospital she was under the supervision and care of the appellant until she was transferred to the Colonial War Memorial Hospital on the recommendations of the appellant. The tribunal has relied on the evidence of Dr. Fong in arriving at the conclusion that the death was due to the injuries caused to the bowels in the course of the hysterectomy surgery. At this stage the court is not entitled to go to the extent of considering the admissibility of evidence and the reliability of the witness unless it is obvious from the proceedings that the tribunal has made an erroneous finding. From the reasoning of the tribunal on this issue I do not see that the appellant has a ground of appeal which she can successfully maintain at the hearing of the appeal.

[21] The learned counsel for the appellant submitted that the tribunal has placed lot of weight on the appellant's failure to sign part A of the consent form. The learned counsel for the appellant submitted that the failure on the part of the appellant to sign the correct part of the consent form does not in any way establish that the deceased was not informed about the risks of the surgery. The learned counsel submitted further that the appellant clearly testified at the trial that the deceased was informed that risk complications are inherent in all surgical procedures.

[22] The consent form is the only available evidence to establish that the doctor explained risk involvement in the surgery and that the patient gave her consent to the surgery. There is also a requirement that the signature of the patient has to be witnessed by someone. In this form the appellant has not signed certifying that she explained the nature, likely results and risks of the surgery but signed as the witness to the patient's signature. I therefore, do not see a ground of appeal which can successfully be maintained by the appellant at the hearing of the appeal.

[23] The attention of the court was drawn by the learned counsel for the appellant to the observations made by the tribunal that "this is unprofessional conduct which has to be penalised in the interest of the public of Fiji", is contrary to the provisions of section 3(1) of the Medical and Dental Practitioner Decree 2010 which provides that the object of the Decree is to protect the health and safety of the public in relation to the practice of medicine and dentistry and submitted that the Medical and Dental Practitioner Decree 2010 makes it abundantly clear that its object is to protect the health and safety of the public and not to punish or penalise the practitioner. It is to be noted that a penalty is imposed for the negligence of a medical practitioner to prevent the happening of such things in future and it would certainly protect the health and safety of the public. The learned counsel also submitted that the penalties imposed by the tribunal are disproportionate, harsh and excessive in all circumstances of the case. If the court finds at the hearing of the appeal that the penalties imposed are hash, excessive, and disproportionate it will certainly reduce the quantum and the period of suspension but it will not be a ground for the court to set aside the findings of the tribunal in its entirety. This is in my view not a ground to stay the execution of the order of the tribunal pending the appeal.

[24] Since this is not a usual civil action between the appellant and the respondent some of the grounds set out in the case of **Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd** (*supra*) cannot be applied this case. The respondent has done its duty in bringing the appellant before the tribunal and it is the matter for the appellate court to consider the findings of the tribunal and decide the appeal. The respondent has no personal interest in the matter. Whatever it has done is in the interest of the general public. Whether the stay is granted or not it will not affect respondent in any manner. The court is therefore not in a position to consider in whose favour the balance of convenience lies if the stay is granted or not.

[25] The learned counsel for the appellant submitted that the following are cogent reasons constituting special circumstances for the court to consider in deciding whether the operation of the order should be stayed pending the appeal or not;

(1) There is a high number of women in Fiji who prefer private obstetrical and gynaecological as opposed to public hospital treatment;
(2) There is no option to women in the Northern Division of Fiji to seek treatment from an obstetrician and gynaecologist in private sector and as such they travel Suva to receive treatment for obstetricians and gynaecologists practicing in the private sector; and
(3) Patients seeking treatment from an obstetrician and gynaecologist are exclusively female and as such prefer their antenatal care and gynaecological treatment to be provided by a female obstetrician and gynaecologist.

[26] These grounds are totally based on assumptions. There are no materials before the court to consider the basis on which the appellant arrived at these conclusions. Whether male or female they all are doctors. There may be few patients who would like to consult female doctors but it is not special reason for the court to stay the execution of the order of the tribunal. The fact that the Mercy Clinic is not in a position to attend to its patients cannot in anyway be considered as a ground to stay the decision of the tribunal pending the appeal because if the court considers all these grounds as cogent reasons constituting exceptional circumstances warranting the stay of operation of the order of the tribunal the court will have to stay every

such order because these are problems almost every medical practitioner who is in the same position would be confronted with.

[27] I accordingly, make the following orders:

(1) The application for the stay of the operation of the order dated 08th July, 2016 of the Medical and Dental Professional Conduct Tribunal is refused.

(2) The appellant shall pay $2000 as costs of this application to the respondent within 14 days from the date of this order.

Lyone Seneviratne,

JUDGE.

14th November, 2016.