

**IN THE MEDICAL AND DENTAL
PROFESSIONAL CONDUCT TRIBUNAL**

Application No: 1 of 2017

IN THE MATTER of a complaint
against **SACHIDA MUDALIAR** by the
Fiji Medical Council and pursuant to
section 74(1) (d) of the Medical and
Dental Practitioner Decree 2010.

BETWEEN : **FIJI MEDICAL COUNCIL**
APPLICANT

AND : **SACHIDA MUDALIAR**
RESPONDENT

Coram : The Hon. Mr. Justice David Alfred, President of the
Tribunal

Counsel : Ms. N. Tikoisuva for the Applicant
Mr. M. Raza, Mr. A. K Singh with him, for the
Respondent

Date of Hearing : 21 April 2017

Date of Decision : 24 April 2017

DECISION


1. This is a Summons filed by the Respondent seeking the following orders:
 - 1) That the Tribunal has no jurisdiction to hear the complaint filed by the Applicant.
 - 2) That the (substantive) Application be stayed pending the determination of this application.
 - 3) Costs
 - 4) Other relief
2. At the outset I shall set out the background of this matter. The Applicant had filed a Complaint against the Respondent alleging that the Respondent, a registered medical practitioner had committed unprofessional conduct in the course of providing medical care and treatment of a patient, who for obvious reasons, I shall not name. This Complaint was filed in the Registry of the High Court, Suva on 22 February 2017.
3. The Respondent then filed on 16 March 2017 the above summons pursuant to section 75(1) and (2) of the Medical and Dental Practitioner Decree 2010 (Decree) upon the grounds contained in his affidavit sworn on 16 March 2017. Therein he deposed in essence, that on 4 February 2016, the Applicant had received the recommendation of the Professional Conduct Committee that the matter be referred to the Tribunal. However the Complaint/Application was only filed on 22 February 2017.
4. The Applicant in its C.E.O.'s affidavit in response to the Summons, essentially agreed with the Respondent's assertions, but contended that in the public interest the delay of the Applicant should be considered and therefore the Tribunal has jurisdiction to hear this matter.
5. The hearing commenced with the Counsel for Respondent submitting that the complaint had been filed 9 months and 10 days after the expiry of the specified 42 days on 17 March 2016. He argued that the 42 days time laid down was mandatory and not directory, and asked for the Complaint to be dismissed with costs on an indemnity basis.

6. Counsel for the Applicant then submitted. She conceded that the 42 days requirement was mandatory and it was so stated in the Applicant's affidavit. However she contended the Applicant could proceed under s. 76(2) of the Decree, though she admitted it would be difficult to say that the public interest overrides limitation. She had been unable to come across any authority on the point. Counsel concluded by asking, if costs were to be awarded, it should be for a minimal amount.
7. This Summons revolves around the issue whether the 42 days time laid down in s. 74(2) of the Decree for laying a complaint to the Tribunal is a mandatory provision or a directory one. The leading authority where the distinction between the two was lucidly and succinctly stated is the opinion of the Judicial Committee of the Privy Council in: *C. Devan Nair and Yong Kuan Teik* [1967] 2 A.C. 44-45. Lord Upjohn said that "mandatory" means a failure to comply strictly with the time laid down renders the proceedings a nullity; while "directory" means literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge.
8. The lawmaker of the Decree has laid down the following schedule of actions and times for the laying of a complaint to the Tribunal.
 - (a) Under s.56(1) a complaint is laid before the Professional Conduct Committee (Committee)
 - (b) Under s.62 (1) the Committee (a) should conduct proceedings as expeditiously as possible and (b) must report to the Council its findings and its recommendation on a complaint as soon as practicable after making them.
 - (c) Under s.74 (2), a complaint must be laid within 42 days of the receipt of the recommendation by written notice to the Registrar of the Tribunal.
 - (d) Under s.74 (1) (d) the Tribunal has jurisdiction to hear a complaint laid by a Council on the recommendation of a Committee.

9. A perusal of the relevant provisions I have set out above cause me to lean towards a conclusion that the lawmaker did not intend the time schedules to be strictly adhered to, though he did want complaints to be attended to.
10. My determination is that the provisions of s.74 (2) of the Decree are directory.
11. However this does not avail the Applicant in this matter for the delay was inordinate and inexcusable. It is significant that instead of providing cogent reasons why I should enlarge the time, the Applicant instead engaged in a jeremiad
12. In the result, the summon is allowed and the Complaint of the Applicant against the Respondent is dismissed. In the circumstances, however I shall make no order as to the costs of these proceedings.

Delivered at Suva this 24th day of April 2017.




Mr. Justice David Alfred
President of The Medical and
Dental Professional Conduct
Tribunal