

**IN THE INDEPENDENT  
LEGAL SERVICES COMMISSION**

NO. 009 OF 2012

BETWEEN :

**CHIEF REGISTRAR**  
Applicant

AND:

**NIKO NAWAIKULA**  
1st Respondent

**SAVENACA KOMAISAVAI**  
2nd Respondent

**Applicant :** Mr. V Sharma  
**Respondents :** In Person

**Dates of Hearing :** 30th November 2012, 17th January and 28th February 2013  
**Date of Judgment :** 12th April 2013

**JUDGMENT and SENTENCE**

1. The 1st Respondent is charged before this Commission with one count of professional misconduct contrary to section 83(1)(a) of the Legal Practitioners Decree 2009. The particulars of the complaint read:

*"Niko Nawaikula a legal practitioner, between the 1st day of June 2011 and 1st of March 2012, being the sole practitioner practicing as Nawaikula Esquire, employed and/or instructed and/or allowed one Mr Savenaca Komaisavai to use his name and/or use his law firm's name to prepare and sign-off court document(s) and/or conduct proceedings in the Nasinu Magistrate's Court for the accused in the matter between Anil Sharma –v- The State Criminal Case No 400 of 2011 when the said Mr Savenaca Komaisavai did not have a Practising Certificate, which conduct was a contravention of the provisions of section 53 of the Legal Practitioners Decree 2009 and was an act of professional misconduct."*

To this complaint the practitioner has entered a plea of guilty but has advanced considerable persuasive material in mitigation.

2. The 2nd Respondent faces two counts of professional misconduct contrary to section 83(1)(a) of the Legal Practitioners Decree 2009. The complaints read as follows:

**COUNT 2**

*"Savenaca Komaisavai a legal practitioner, between the 1st day of June 2011 and 1st of March 2012, made attendance(s) at the Nasinu Magistrate's Court acting as legal practitioner for the accused in the matter between Anil Sharma -v- The State Criminal Case No 400 of 2011 without a valid Practising Certificate, which conduct was a contravention of the provisions of section 52(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct."*

**COUNT 3**

*"Savenaca Komaisavai a legal practitioner, between the 1st day of June 2011 and 1st of March 2012, acting as a legal practitioner prepared instruments, namely a Notice of Motion and/or Affidavit in Support, relating to legal proceeding in the Nasinu Magistrate's Court for the Accused in the matter between Anil Sharma -v- The State Criminal Case No 400 of 2011 without a valid Practising Certificate, which conduct was a contravention of the provisions of section 52(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct."*

To these complaints he has entered pleas of guilty but claims a defence firstly of acting *pro bono* and secondly and in the alternative being in the employ of the first Respondent.

**THE FACTS**

3. The 2nd Respondent at the material time, was without a practising certificate, he waiting to comply with all the requirements of the then Registrar. While being in such a state of illegitimacy, and "working" within the environs of the Magistrate's Court in Nasinu, he received instructions from a Mr. Anil Sharma to secure possession of the said Mr. Anil Sharma's passport which had been lodged as security with the Nasinu Magistrate's Court.
4. In an attempt to regain the passport for Mr. Anil Sharma, the 2nd Respondent on the 17th of October 2011 sought a private meeting with the Resident Magistrate in Nasinu, an approach which was rebuffed by the senior court officer at that court.
5. Following the Magistrate's refusal to see him, the 2nd Respondent then at 3pm that same day filed in the Nasinu Court an Ex-parte Notice of Motion, accompanied by Affidavit to have the passport returned and to allow Mr. Anil Sharma to travel to the USA for medical treatment. The documents purport to have been prepared by and were being filed by the firm of Nawaikula Esquire, 8 Nina Street, Suva.
6. At some stage after the documents had been prepared, the 2nd Respondent telephoned the 1st Respondent asking that he be temporarily "employed" by the 1st Respondent for the purposes of filing documents under the 1st Respondent's name and for having Mr Nawaikula's firm act for Mr. Anil Sharma.

## DISCUSSION

7. As counsel for the Applicant has done in his very helpful submissions, it is more practical to discuss the malfeasance of the 2nd Respondent first; for the simple reason that it was the unlicensed deeds of the 2nd Respondent that brought both he and the 1st Respondent before this Commission.

8. Absent any evidence from Mr. Anil Sharma on this matter, it is a matter of overwhelming inference that the 2nd Respondent was acting as a legal practitioner in terms of section 52(1)(a) of the Legal Practitioners Decree 2009 as well as pretending to Mr Anil Sharma that he was fully entitled to practice as a legal practitioner contrary to section 52(1)(b) of the Decree and lastly that he had prepared "instruments" relating to the personal property, contrary to section 52(1)(c) of the Decree.

9. The 2nd Respondent prays in aid of his defence that he had performed all duties for Mr Anil Sharma on a "pro bono" basis, thus bringing him within the statutory defence to section 51(1)(c) of the Decree. The proviso to this section reads:

*"unless he or she proves that the act was not done for or in expectation of fee, gain or reward."*

10. The elements of the allegation in count 2 against the 2nd Respondent have been made out and this Commission finds the complaint **established**. It is quite clear that the 2nd Respondent was holding himself out to Mr Anil Sharma as a practitioner who could make representations to the Resident Magistrate and who could draft and file documents, in order to get the passport back to his "client" to enable him to travel.

11. Mr Komaisavai's submissions in defence of this allegation are misconceived. It is accepted that he did ask Mr. Nawaikula, the 1st Respondent to be his "principal" for the purposes of this particular case, but it is also apparent that by the time he had asked this of Mr Nawaikula, the mischief had already been done. The 2nd Respondent admits in his explanatory letter to the Chief Registrar that he had prepared the documents and it was only after his capacity to file them was called into question by the clerks at Nasinu that he contacted the 1st Respondent.

12. The Professional Misconduct complained in the third charge is framed to relate solely to the preparation of the documents already referred to in count two. To that extent the count is duplicitous but nevertheless continues the malfeasance to the drafting of the documents as opposed to taking instructions and filing the same documents.

13. The 2nd Respondent's defence to the third count is twofold:

i. That he "acted" for Mr Anil Sharma *pro bono*, and is therefore a beneficiary of the statutory proviso, and

ii. That he was working as an employee of Nawaikula Esquire and therefore

entitled to prepare the documents.

14. These two defences unfortunately cannot be made out. Although the 2nd Respondent had submitted to the Commission that his work was done *pro bono*, there was no evidence of that. An opportunity was given to the 2nd Respondent to appear at an adjourned hearing to provide that evidence, but he did not appear, nor was anything evidential filed.

15. When the 2nd Respondent asked Mr Nawaikula to be his "principal" for the purposes of this case, the documents had already been prepared. This is on the submission of the 2nd Respondent and on the evidence of the 1st Respondent.

16. Neither defence being made out, the Commission finds the third count against the 2nd Respondent **established**, however the duplicity of the charges will be dealt with in determining penalties.

17. The complaint against the 1st Respondent is that in contravention of section 53 of the Decree, he "employed" or otherwise allowed the 2nd Respondent to use the auspices of his firm to conduct proceedings at Nasinu Court for an applicant who wanted the return of his passport, when the 2nd Respondent did not have a practicing certificate.

It is not in dispute that the 2nd Respondent did not have a practising certificate at the time that the 1st Respondent "authorized" him to act as a practitioner in his employ. The charge is predicated on the second limb of the restraint in section 53 of the Decree:

*"nor shall that practitioner allow his or her name to be made use of by any person other than the holder of a current practising certificate in respect of the performance of such an act. A practitioner who contravenes this Section shall be guilty of professional misconduct".*

18. Despite the 1st Respondent's protestations that he told the 2nd Respondent he had to confine his deeds "within the limits he can do under his qualification but not as a practitioner"; the terms of the section are clear and absolute in that allowing an unlicensed person to perform an act only performed by the holder of a certificate is professional misconduct.

19. To receive instructions from a "client" to reclaim a passport held in a court registry and to draft and file documents to that end are all acts within the purview of a licensed legal practitioner, and cannot be delegated to a layman (no matter what his legal background.) The elements of this charge are made out and the complaint **established**.

## **PENALTIES**

20. The 1st Respondent had submitted to the Commission a comprehensive "statement" in mitigation. He pleads lack of evil intent, but merely did what he did to assist the 2nd Respondent who he knew was having difficulties in satisfying the requirements of the then Chief Registrar resulting in professional and personal hardship to the 2nd Respondent.

Unfortunately however after giving the 2nd Respondent "carte blanche" to act on behalf of Mr Anil Sharma, he heard nothing further.

21. One good reason can be seen from these facts as to why the proscription is in place. In a situation where an unlicensed practitioner is wanting to operate under the "umbrella" of a licensed practitioner almost invariably he or she will be "free lance" and not in situ in the licensing practitioner's office and he or she will therefore be beyond the influence and control of the licensing practitioner thereby creating the probability of unchecked disorder. The provisions in the Legal Practitioners Decree (and particularly the provisions relating to licensing) exist to bring order and control over the practice of the profession and the conduct of the individual practitioners and any deviation from this or disregard to the strict provisions will lead to professional anarchy.

22. It is because of this that the 1st Respondent, although he advances strong and noble reasons for his approval of the 2nd Respondent to act under his name, must bear the strict liability of the provisions of section 53 and be penalized accordingly. If nothing else an example must be set to practitioners in that they must exercise extreme care in the work that they delegate to others either legitimately or illegitimately.

23. The conduct of the 2nd Respondent is far more nefarious. In knowing that he was not permitted to practice he took instructions, he attempted to see the Resident Magistrate presumably to make representations to obtain the passport, he drafted documents (including a Notice of Motion and accompanying Affidavit), he filed these in the Nasinu Court, using the erroneous styling of the name and address of Nawaikula Esquire on the backing sheet, and he then sought the retrospective authority of Mr Nawaikula, an authority which Mr Nawaikula was unable to provide in law. All of these actions were actions which could only be properly undertaken by a licensed practitioner.

24. The Commission regards these actions on the part of the 2nd Respondent as professional misconduct to a very serious degree, and a harsh penalty may serve as a warning to others that practicing law without a certificate will not be tolerated.

25. Despite being serious however, the Commission does however allow for the fact that the preparation of the instruments to apply for the return of Mr Anil Sharma's passport was the subject of both the second and third counts in this particular application, although the actions forming the subject make of the second count were much more widely perceived. Both are offences of strict liability and both offences are therefore established but to allow for the duplicity, penalties will only be imposed on the 2nd Respondent in respect of count 2 with "concurrent" penalties on count 3.

## **ORDERS**

1. Both the Respondents are publicly reprimanded.

2. The 1st Respondent is fined the sum of \$2,000 to be paid to the Independent Legal Services Commission within 28 days.

3. Should the payment in order 2 not be made within 28 days the 1st Respondent's practising certificate shall be suspended without further order.

4. The 2nd Respondent's practising certificate is suspended for a period of three months from today's date.

**JUSTICE PAUL MADIGAN  
COMMISSIONER**

**12 APRIL 2013**