IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

NO. 009 of 2009
NO. 010 of 2009

BETWEEN:

CHIEF REGISTRAR
Applicant

AND*:*

IQBAL KHAN & IQBAL KHAN & ASSOCIATES
Respondents

Applicant : Ms. L. Vateitei
Respondents : Mr. G. O' Driscoll

Dates of Hearing : 5th November 2013
Date of Ruling : 5th November 2013

RULING

1. The Respondent ("the Practitioner") makes application by way of Notice of Motion and accompanying Affidavit for me to recuse myself from hearing the complaints filed against him and his firm on the basis that on the 14th April 2011 in a High Court trial at Lautoka I called him "dishonest".

2. This disciplinary hearing against the practitioner is set down to be heard today and for 8 days immediately hereafter. He has had notice of the hearing dates since 8th of March 2013 and they were indeed fixed in consultation with his diary and at his convenience. He has filed this application on the 31st of October 2013, two working days before the hearing is to commence but he has known of this perceived impediment to a fair hearing for seven months.

3. These complaints against the practitioner were listed for hearing in December 2009 before Commissioner John Connors when the practitioner made an identical application for him to recuse himself. Commissioner Connors refused to recuse himself, a decision that the practitioner appealed resulting in the earlier hearing dates being vacated. The practitioner then made another unsuccessful recusal application to Commissioner Connors on the 21st of June 2010.

4. In the light of the fore-going background facts, I regard the present application as an abuse of process, but I shall nevertheless deal with it on its merits.

5. The test for disqualification is the perception of reasonable apprehension of bias. This test is an objective one and it was extensively analysed by the Supreme Court in **Amina Koya** CAV 002/97. The Fiji Court of Appeal followed the test laid down by the Supreme Court in **Pita Tokoniyaroi and anor** AAU0043/2005, the Court there stressing that the bias must be as reasonably apprehended by the reasonable and informed observer. the Court added (in para 47):"it follows that the word "informed" which qualifies the word "observer" is of vital importance."

6. In a similar application by **Mahendra Pal Chaudhry** HAM 160 of 2010, Goundar J. said:

"It is almost universally recognised that Judges discharge their duties in accordance with the oath they take to do right to all manner of people in accordance with the laws and usages of their countries, without fear or favour, affection or ill will. To suggest otherwise is an affront to the judicial oath and to the presumption of judicial impartiality."

7. The New Zealand Court of Appeal in reviewing the case law on bias said in **Muir v C.I.R.** [2007] NZCA 334 said (para12):

It is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual enquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias ball" in the air.

7. The practitioner acted for Shirley Chand in a lengthy intricate fraud case, HAC 024 of 2009 in the High Court at Lautoka. During the course of the trial and in cross-examination of one of the State witnesses, the practitioner sought to put an earlier statement of the witness to her in an attempt to show inconsistency. As Judge presiding at the trial, and for reasons that are not relevant to this application, I had ruled that the prior statement not go to the assessors as an exhibit. I was rather astonished that the practitioner in his closing address to the assessors read the earlier statement out to the assessors, thereby defeating my earlier ruling. In the absence of the assessors I spoke to the practitioner about his closing address and told him that the use of the statement was dishonest. At no time did I call into question the credibility of the practitioner; my allegation was that the practitioner as defence counsel had resorted to dishonest tactics in a vigorous defence of his client.

8. An observer who was "reasonably informed" of these facts would not now say, two and one half years later, that I could not turn an impartial ear to the practitioner's disciplinary matters.

9. Moreover, the practitioner has appeared before me several times since, in the High Court, the Court of Appeal and in the Supreme Court without making an application for me to recuse myself on the grounds raised today.

10. Most of the disciplinary charges faced by the practitioner in these proceedings do not anticipate a finding as to the practitioner's credibility. They are factual allegations of misconduct in private practice. Even if an observer were of the unsustainable view that I had in April 2011 regarded the practitioner as dishonest, that would not preclude this Commission from conducting a fair and unbiased inquiry into the bulk of these allegations.

11. In the premises, I refuse the application.

JUSTICE PAUL MADIGAN
COMMISSIONER

5 NOVEMBER 2013