

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 029 of 2013

BETWEEN:

CHIEF REGISTRAR
Applicant

AND:

DEVANESH PRAKASH SHARMA
1st Respondent

R PATEL LAWYERS
2nd Respondent

Applicant : Ms. L Vateitei
[12th December 2013 and 24th March 2014]
Mr. M. Waibuta with Mr V. Sharma
[16th June, 7th August and 29th September 2014]

Respondents : Mr. D Sharma & Mr. P Sharma

Dates of Hearing : 12th December 2013, 24th March, 16th June, 7th August and 29th September 2014

Date of Ruling : 12th November 2014

RULING

1. The 1st Respondent ("the practitioner") is a partner in the 2nd Respondent ("the firm"). Both Respondents apply that the allegations (charges) laid against them be struck out for abuse of process.
2. In the Commission's judgment in **Adish Kumar Narayan [Matter No 009 of 2013]**, it was said that in only truly exceptional circumstances would the Commission entertain an interlocutory application (for the reasons given in **Narayan**).
3. This complaint and its prosecution do engender truly exceptional circumstances as will be seen *sub*.
4. On the 15th of June 2011 an aggrieved client ("RK") of the firm and of the practitioner in particular who had been acting for him in a matrimonial dispute laid a complaint against both parties with the Chief Registrar ("CR").
5. On the 27th of November 2013, **more than two years later** (my emphasis intended), the CR filed charges as ILSC Application No. 029 of 2013 against both the practitioner and the firm. (These charges can be seen reproduced at Annexure "A"). At no time during these two years was any meeting sought with the firm nor the

practitioner nor were they ever asked for further explanation or given a chance to respond to the specific allegations.

6. The practitioner on behalf of himself and his firm submitted on this Application that the CR, or more particularly the Legal Practitioner's Unit ("LPU") of the Chief Registrar's Office had conducted a malicious prosecution against them and had engaged in "rogue conduct" which had prevented them from defending themselves and that the whole proceedings were unfair and they had exhausted all efforts to get a response to their submissions from the CR.

DISCUSSION

7. While this Commission has not seen nor heard any evidence that would go to even suggest that these allegations of misconduct against the practitioner and his firm are founded on malice and vindictiveness, there is much force in their submissions that they have been unfairly treated since the initial complaint of their client was made. The conduct of the Legal Practitioners' Unit ("LPU") in investigating the complaint appears unfortunately to have been lackadaisical, to have been very one sided and biased and there appears to have been an attitude of ensuring that the allegations be proved at any cost.

Let the evidence speak for itself:

8. The Registrar, having received the complaint on the 15th of June from the client (RK) of the firm and of the practitioner 2011 wrote to the firm (but not the practitioner) 14 weeks later (on 23rd of September 2011) enclosing a copy of the complaint and asking pursuant to section 106 of the Decree for a "copy of the client file and all other relevant documentation."

9. There is no evidence before the Commission of any communication of the complaint to the practitioner as is mandated by section 104(a) of the Decree.

10. In response to that letter, the practitioner on behalf of the firm, whilst not directly requested to do so responded to the CR on the 11th of October 2011 by way of 50 page submission in which he gave reasonable and quite plausible explanations for the complaints made. He detailed work undertaken by the firm that substantiated the invoices raised and asked that these explanations be considered before formal allegations were made against the firm. Throughout the letter of explanation, the practitioner on behalf of the firm asked in all courtesy for further and better particulars of the complaints in order that they may be properly addressed because the complaints had been made in very general terms.

11. This letter was not even acknowledged let alone considered and responded to. Even to this day further and better particulars have not been provided to the two Respondents, save as what was included in the Amended Charges (see later).

12. Without appropriate communication or contact, the CR then filed charges against the practitioner and the firm on the 27th of November 2013. (see Charges in Annexure "A")

13. This was **2 years and one month** (my emphasis) after the firm (but not the practitioner) had been notified of the complaint. In this time there was no attempt to require a "sufficient and satisfactory explanation" in terms of section 105 of the Decree, nor was there any attempt to make any efforts to "facilitate the resolution of the matter, including mediation" in terms of section 109(1)(b) of the Decree.
14. However, within this period the CR, while steadfastly ignoring the firm and the practitioner, was obtaining further and better particulars from the complainant. A statement was taken from him on the 25th of January 2012.
15. This statement was never disclosed to the Respondents until the charges were filed on 27th of November 2013.
16. The initial charges laid are notable for their poor drafting and even the name of the practitioner was spelt wrongly in every one of the 6 charges laid against him. The charges were in themselves very general, without dates and without particulars given that would enable the two respondent parties to prepare a proper defence to the allegations made.
17. Once more the practitioner (who had never been advised of the complaint in the first place) wrote to the CR on 11th of December, again seeking further and better particulars for Charges 1, 2, 4, 5 and 6.
18. Again this letter was not acknowledged but a reply was sent 75 days later in which Ms Vateitei for the CR said that the particulars were private and not relevant to the charges.
19. At a hearing before the Commission on 12th of December 2013, it transpired that the charges had not been served on the firm but on the practitioner. That left the situation that the initial complaint had been served on the firm but not the practitioner and the charges had been served on the practitioner, but not the firm.
20. At that hearing (12.12.13) Ms Vateitei for the CR asked for more time to amend the charges and effect proper service.
21. The practitioner wrote once more to the CR on the 20th of December 2013 making detailed submissions on the charges. A reply was received on the 9th of January in which the CR said in respect of the submission, "due consideration will be given to it and our position will be made known to you." The practitioner immediately replied asking for an explanation of the complaints against him and the firm and asking for mediation if the CR thought that that would be appropriate. He did seek in that letter a response to his letter of 11th of December 2013 in which he had asked for further and better particulars.
22. There was no response to this letter and it would appear that no consideration was given whatsoever to the documents that the practitioner had submitted.
23. The practitioner wrote a final letter to the CR in reply to the very unsatisfactory letter from him dated 24th of February 2014.

24. He pointed out that he had not been afforded the courtesy of being served with further and better particulars. He stated in addition that as there had been no contact with him or his firm, the CR was not aware of the nature of their defence and consequently it could not be for him to say what particulars were relevant or not. He forewarned the CR of this instant application to have the allegations dismissed on the basis of abuse of process. He asked for reply to his letters of 11th of October 2011 and 9th of January 2014.

25. Again no acknowledgement nor any reply.

26. On the 3rd of March 2014 CR filed his "Amended Charges" against both the practitioner and the firm. (See Annexure "B"). The original charges were not withdrawn.

27. At a hearing before the Commission on the 24th of March 2014, the practitioner complained of the fact that he was now facing 17 charges, the majority of which were *sub judice* because the firm had sued for repayment of the fees owing.

28. The two new and very serious charges, Charges 9 and 10, he submitted had already been shown to Counsel for the CR that they were based on a mistake of fact because the offer to settle the dispute had come from a third party Solicitor whom the complainant had now instructed, and not from the Respondents as alleged. With this knowledge that the charges could not possibly be made out, the CR had nevertheless included them in the charge sheet. The letter from the third party Solicitor proving this fact had been sent to the CR earlier and it was remarkable that it had not been included in the bundle of exhibits with the other documents produced to support the charges.

29. Ms Vateitei for the CR now at the request of the practitioner moved the Commission to withdraw the original charges which were still before the Commission.

30. The practitioner told the Commission that he had been waiting for 2 years and 5 months for a reply to his letter of 11th of October 2011 and 3 months for a reply to his letter of 20th of December 2013. With no contact from the CR he was impelled to move the motion for stay on the grounds of abuse of process.

31. It was noted at this hearing that the amended charges included one completely new one (see Count 4 Annex "B") which the Respondent firm had been given no opportunity to address and the other counts can be seen to be very poorly drafted with bad grammar, a lack of particulars and in Count 8, not even a date of the offence alleged. At least by now the practitioner Respondent's name was being spelt correctly.

32. The Commission adjourned the hearing until the 16th of June 2014 for the CR to reconsider the charges in light of all that had preceded this hearing.

33. At the adjourned hearing on 16th of June 2014 M. Waibuta ("MW") and V. Sharma ("VS") appeared for the CR. At that hearing the CR asked for a further adjournment to "review the charges". A new date of 11th of July 2014 was given. On the 4th of July the CR wrote to the Commission seeking a further 14 days to file

written submissions and to vacate the fixture of 11th of July. On the 22nd of July the CR filed written submissions and asked for an early hearing date. A new date of 7th of August 2014 was then fixed.

34. On the 7th of August at what proved to be an extraordinary hearing, VS with MW for the CR advised the Commission that the Respondents had filed written submissions which were "very beneficial", which the Respondents pointed out were the exact same submissions that they had filed earlier in December 2013 which had never been responded to by the CR.

35. Counsel then told the Commission that the submissions of the Respondents, despite being "beneficial" were nevertheless unsuccessful.

36. When asked why, VS for the CR said that they were now "taking a different approach" and they would let the matter be decided by the Commission.

37. The lack of contact with and response to the Respondents, VS said was by different Counsel and was earlier but now it was being handled by him and MW and they would proceed to hearing.

38. He clarified that the CR was not prepared to "make a stand" on the propriety of the charges but would leave it to the Commission.

39. The Respondent said that in those circumstances they would proceed with their stay application.

40. The stay application was heard on the 29th of September 2014. At that hearing counsel for the CR defended the application by arguing the merits of a hearing when the matter was sub judice in the High Court and made no submissions whatsoever on the claimed abuse of process.

ANALYSIS

41. There is no doubt in my mind that this has been an unfair and biased prosecution of the purported disciplinary offences against both the practitioner and the firm.

42. It is also very apparent that the three counsel involved have, whether it be from inexperience or a generally indolent work ethic, done nothing to address the requests and uncontested evidence provided by the Respondents and as they say "left it to the Commission to decide. "

43. This Commission is a statutory body set up to hear allegations filed by the Registrar and after hearing all of the evidence to determine whether those allegations are established or not. It is **NOT** for the Commission to decide what allegations are to be made against a practitioner or a firm. The suggestion by Counsel for the CR (VS) that he would "leave it to the Commission to decide" is not only offensive to the role of the Commission but a dereliction of the duty of the investigators and legal staff of the LPU to settle the appropriate charges to bring before this Commission for hearing.

44. Despite repeated submissions from the Respondents and oblivious to strong directions from the Commissioner, the prosecuting counsel in this matter continued to press charges against the Respondents even when shown in respect of Counts 8 and 9 of the "Amended Charges" that those charges were based on mistake of fact or on wrong information maliciously given to them by the complainant.

45. As a prosecutor in a criminal trial must fairly present all available evidence to the Court and must not operate to secure a conviction at any cost; so must a Counsel appearing in the name of the CR present all evidence fairly and not operate to have a practitioner or a firm found guilty of professional misconduct no matter what.

46. It is a shame that the good office of the Chief Registrar is impugned by unfair and biased practices by officers acting in his name.

47. One of the most glaring incidents of unfairness in this matter was in the way that neither the firm nor the practitioner were asked to address the allegations of over-charging and of perverting the course of justice in the first place. Indeed the firm was served with details of the complaint but not the practitioner.

48. The practitioner took it upon himself to write a very detailed and very plausible submission in defence to the complaint which was sent to the CR in October 2011. To this day these submissions have never been responded to.

49. Neither of the Respondents was contacted to discuss the allegations; nor was the suggestion of mediation ever made pursuant to section 109(b) of the Decree.

50. The practitioner having made a detailed exculpatory submission to the CR on behalf of his firm and on his own behalf must have had the reasonable expectation after hearing nothing from the CR in two years that the matter had fallen into abeyance or was not going to be proceeded with. One can imagine his shock when served with 6 charges (and his firm with one) on the 27th of November 2013.

51. Having asked two years before for particulars of the offence and not been provided with them, the practitioner as a potential "accused person" in terms of the Constitution has had his rights under section 14(2)(d) of that Constitution breached.

52. Although practitioners are not "accused persons" as envisaged by the Constitution, I will now declare that for this matter and all future matters before this Commission, the rights of persons being investigated and charged under the Legal Practitioners' Decree will be afforded all of the rights afforded to accused persons in the Constitution 2013.

53. This Commission sits in judgment on practitioners and firms who are charged with unsatisfactory professional conduct or professional misconduct. It is one of the roles of the Commission to raise the standards of conduct within the profession. As such those investigating and prosecuting these alleged offences must be seen to be paragons of professionalism and set examples by their exemplary conduct.

54. Professionalism extends to answering letters **always**, even if it is just to acknowledge receipt. It is not professional at all to ignore requests for further

particulars – it is not professional at all to delay replies and then refuse the request.

55. It is difficult to understand that in response to a request for further particulars from the Solicitor of a client who has complained that he be told that the particulars are confidential and not relevant . Relevance to a defence is not for the LPU to decide; they must disclose. Moreover any information from the client must have been information that had passed at one stage between him and the Solicitor; so why would it have been confidential?

56. There seems to be some force in the practitioner's submission that this prosecution was to some degree biased against him.

57. It is not for Counsel of the LPU to assume that any practitioner complained of is automatically guilty. He must be presumed to be innocent until found otherwise. It is very sad that this must be said, but the Commission has seen, not only in this case but others as well, that Counsel are prejudiced against the Respondent practitioner or firm.

58. There needs to be an atmosphere of fairness and justice within those Chambers which sadly appears to be lacking.

CONCLUSION

59. This practitioner and this firm have been treated with rather outrageous prejudice and insouciance despite their repeated requests for particulars and submissions in defence. Their entreaties were ignored and even when shown that some of their charges had no factual basis they insisted on proceeding. In the end they appeared to give up and wanted this Commission to decide on the charges.

60. The investigators and prosecutors have by their actions or inactions breached the Constitutional rights of the two Respondents enshrined in Sections 14(2)(b), 14(2)(e) and 14(2)(g). By talking only to the complainant and ignoring the Respondents, their right to a fair trial pursuant to section 15(1) has been breached.

61. This Commission has no hesitation whatsoever in finding that there has been a clear abuse of process in this matter. As a result the proceedings are stayed and the charges before the Commission are struck out.

**JUSTICE PAUL MADIGAN
COMMISSIONER**

12TH NOVEMBER 2014