

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 028 of 2013

BETWEEN :

CHIEF REGISTRAR
Applicant

AND:

HEMENDRA KUMAR NAGIN
1st Respondent

SHELVIN SINGH
2nd Respondent

Applicant : Mr. M. Waibuta with Mr V. Sharma

Respondents : Mr. R. Naidu [1st Respondent]

Mr. R. Newton [30/01/14]

In Person [2nd Respondent]

Dates of Hearings : 30th September and 29th October 2014

Date of Ruling : 12th November 2014

RULING

1. The 1st and 2nd Respondents face one charge each of professional misconduct complained of by the Chief Registrar.

Those charges read:

ALLEGATION 1

PROFESSIONAL MISCONDUCT: *Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009*

PARTICULARS

Mr. Hemendra Nagin a legal practitioner, partner of Sherani & Company , around the 6th of June, 2013, while acting for Mr. Jagdish Narayan in a Sale and Purchase Agreement, acted without instructions of the said Jagdish Narayan who was the Director of Pyramid Pacific Investments (Fiji) Limited being the vendor in the said agreement consented to an amendment in clause 24.2 of the same agreement, which conduct was an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.

ALLEGATION 2

PROFESSIONAL MISCONDUCT: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

PARTICULARS

Mr. Shelvin Singh a legal practitioner of the law firm Parshotam & Company, around the 6th of June, 2013 whilst acting for Orix Holdings Limited (Purchaser) amended clause 24.2(a) of a land Sale and Purchase agreement in handwriting whilst the vendor Mr. Jagdish Narayan (director of Pyramid Pacific Investment (Fiji) Limited) did not agree to the said amendment and proceeded to use the said amended Sale & Purchase Agreement to the detriment of the vendor, which conduct was an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.

2. At a hearing of the matter on the 30th of January 2014, Senior Counsel for the 2nd Respondent raised the issue of the same allegations being the subject of proceedings filed earlier in the Civil Division of the High Court. He made an application therefore that this disciplinary hearing be adjourned until such time that those proceedings be finally determined on the basis of the *sub judice* doctrine.

3. The 1st Respondent adopted this application for the same reasons.

4. Counsel for the Registrar submitted no more than that the public interest had to be protected but offered no authority against the application, nor did they seek time to oppose it.

5. The Commission acceded to the Respondents' application and made an order that this disciplinary hearing not be held until such time as the High Court had made its findings of fact; and that the Registrar, being aware of the High Court proceedings, was acting prematurely and improperly in wanting to proceed with the hearing of this matter founded on exactly the same factual scenario as was being adjudicated on in the High Court.

6. The Ruling was signed and sealed and read:

"This Commission will not hear this Application at present. The complaints are not dismissed because at the conclusion of the High Court proceedings, the Registrar may wish in the light of the Judge's findings to reconsider the Allegation"

7. On the 22nd of July 2014, nearly 6 months later, Counsel for the CR wrote to the Commission, fore-warning that they were about to file a Notice of Motion to have the Ruling set aside on the basis that they were not able at the hearing of 30th of January to provide case authorities in reply to the application for stay on the basis of the matter being *sub judice*.

8. On the 13th of August 2014 the Registrar filed a Notice of Motion with Affidavit in Support to set aside the Ruling and a direction hearing was held on 30th

of September 2014. At that hearing a time-table for the filing of submissions was fixed. In addition, Mr Waibuta submitted that the Commissioner had powers to revisit any interlocutory ruling on the basis that he is not *functus officio* until a final determination is made after a hearing on the allegations.

9. Mr Waibuta referred to a few cases in support of his arguments but once again he had come unprepared without copies of the cases involved and without properly prepared submissions.

10. At a final hearing of the matter on the 29th of October 2014, counsel for the Registrar had at last prepared a bundle of submissions with copies of their authorities for the Commission and for the Respondents.

11. At that hearing the parties made submissions on whether the Commissioner had inherent jurisdiction to vary or set aside an earlier ruling, in the absence of any legislative authority to do so.

DISCUSSION

12. The Commissioner of the Independent Legal Services Commission, having the same powers of a Judge of the High Court, has the inherent jurisdiction that pertains to the High Court. This was a finding made in the Commission in the case of **Chief Registrar v AK Narayan (Stay Application)** 009 of 2013 (25 September 2013) where it was said:

"There can be no doubt that this Commission does have inherent powers to stay proceedings in appropriate circumstances, whether it be for delay causing unfair prejudice to a practitioner Respondent, to ensure fairness to a particular party or to prevent abuses of its own processes".

13. Whether the Commissioner can use that power to vary or set aside final orders is an entirely different question.

SHOULD THE PERFECTED ORDER BE SET ASIDE?

14. In accordance with authority, the Commission would use its inherent powers "in exceptional circumstances" to address clearly identified abuse(s) of process and inordinate delay on the part of the prosecution. To re-open a decision as to when a hearing should take place and where that decision was discussed with the applicant party appearing is not an "exceptional circumstance".

15. On the 30th of January, counsel for the Registrar appeared for the first time in this matter, the earlier counsel having proceeded on maternity leave. They now say that there was not a proper "hand-over" and that they were not expecting to defend a submission on stay on the basis that the matter was being heard in the High Court. At the hearing they made very limited oral submissions on the point and if they had asked for time to research the matter and make meaningful submissions then in those circumstances time would have surely been given to them.

16. It is not for Counsel to go away and then subsequently when they had found

cases which they thought would assist them to ask the Tribunal to set aside its earlier order.

17. The Commission having made its order on that particular application is *functus officio*. The submission by the Registrar that the Commissioner can never be *functus* until the end of the entire hearing has no merit. Were I to make decisions on the substantive hearing that would be the case; but an interlocutory application, (strongly discouraged within hearings), stands apart from the hearing itself and for that reason the *functus* rule must apply.

DOES THE SUB JUDICE DOCTRINE APPLY?

18. Despite the fact that I have made findings on the procedural issues raised by the parties, these might all be academic if it is found that the same issues are being dealt with in the Civil Division of the High Court.

19. Counsel for the Registrar accept that the civil court is dealing with much the same subject matter but they argue that that does not prevent the Commission proceeding to hear the disciplinary charges against the two practitioners for two reasons.

20. First they submit that the function of the High Court *vis a vis* that of the Commission is very different. They argue that the hearing of the matter in the Tribunal will determine whether the two interested parties have professionally misconducted themselves; while the hearing in the High Court will determine who is at fault in a contract dispute.

21. Secondly, they submit that the authorities which they proffer support the proposition that even if a matter is in contempt it being *sub judice* then it can proceed if it is in the public interest to do so. They argue that the findings as to the conduct of these two practitioners are fundamentally important to the consumer public, because if the allegations are found to be established then they must be "removed" from practice to prevent any recurrence of the offending conduct. They rely on the England and Wales Court of Appeal case of **A.G. v Times Newspaper Ltd** [1973] 1 All ER that stressed the importance of determining the interest of all parties when departing from the strict rule against duplication.

22. The propositions that they advance may well apply to newspaper reporting of events being considered by a Court of Law, but cannot apply to this Commission conducting an enquiry into matters being aired in the High Court.

23. Proceedings have been instituted in the High Court to establish the validity of contract where it has been claimed that the contract was unilaterally altered by one of the parties, leading to this disciplinary hearing.

24. The subject matter is identical. A Judge of the High Court will determine whether the contract was altered without authority and this Commission will decide if that also be the case, and if so will consider appropriate penalties.

25. No clearer duplicity of findings to be made can be conceived. What Counsel

claim to be the public interest in having these two practitioners "removed" to protect the public not only presumes the outcome of the within disciplinary matter, but places far too much emphasis on one part of competing interests. It is also in the public interest that justice be seen to be done and by proceeding to usurp and pre-empt a pending decision of the High Court is not serving that interest.

26. This hearing will eventually be effected if the High Court makes findings adverse to the practitioners, and by waiting for another year or so will not lead to these two very senior practitioners indulging in wholesale alteration of contracts before them.

27. The Commission's Ruling of 30th of January 2014 will remain in effect and it will only be disturbed by direction of the Court of Appeal.

28. The application by the Chief Registrar is refused.

**JUSTICE PAUL MADIGAN
COMMISSIONER**

12th November 2014