**IN THE INDEPENDENT LEGAL SERVICES COMMISSION**
**AT SUVA**

N0. 002 of 2021

BETWEEN: **CHIEF REGISTRAR**

Applicant

AND: **SHELVIN SINGH**

Respondent

**Applicant:** Ms. J. Sharma
**Respondent:** Mr. A. Nand

**Date of Hearing:** 11th April 2022
12th & 13th May 2022
22nd June 2022

**Date of Ruling:** 29th June 2022

# INTERLOCUTORY RULING

(On no case to answer)

## Introduction

1. The Respondent, Mr. Shelvin Singh is charged with one count of unsatisfactory Professional Conduct contrary to Section 81 of the Legal Practitioners Act 2009 due to the failure to protect the interest of his client namely Mr. Omar Niazi by failing to prepare and have the parties namely Omar Niazi and Mohammed Towahir to execute a Deed of Settlement, after a partial settlement was reached between the said parties on the 13th day of June, 2019.

2. On 11th April 2022 the inquiry commenced with the complainant Mr. Omar Niazi and upon the conclusion of his evidence the applicant closed their case on 13th May 2022. The Respondent at this stage sought time to make a no case to answer application. Time was granted until 22nd June 2022 for the Respondent to formally

make the application upon obtaining the transcripts. However, on 22nd June 2022 the respondent sought further time as they have not been able to obtain the transcripts. The counsel for the Applicant at this stage made an application that as a matter of law the respondent does not have right to make an application for no case to answer in these proceedings and in support cited the cases of *Chief Registrar v Narayan [2014] FJILSC 6; Case 009.2013 (2 October 2014)* and *Chief Registrar v Marawai [2012] FJILSC 9 (18 July 2012).*

3. The respondent submitted that in the cases of *Chief Registrar v Clarke [2010] FJILSC 0003/2010 (01 December 2010)* and *Chief Registrar v Mishra [2010] FJILSC 0002/2010 (24th annuary 2011)* no case to answer applications have been considered and orders have been made and that there is precedent that such applications may be made in proceedings before this Commission. Ruling was reserved for 29th June, 2022 and both parties were permitted to tender written submissions if they so desire. Written submissions have been tendered by both parties accordingly this ruling is thus made.

**The Matter for Determination**

4. On the perusal of the written submissions and considering the oral submissions it is clear that pervious Commissioners have in the determinations of *CR v Clerk* and *CR v Mishra* (supra) entertained no case to answer applications. In *Clerk* there are no reasons but a mere extempore ruling determining that there is no case to answer but in *Mishra* Commissioner Jhon Conners has applied and adopted the 'no case tests' as determined in *Director of Public Prosecutions v Thirpathi Gounder and Another* 17 FLR 118 and the Federal Court of Australia in *Rasomen Pty Ltd v Shell Company of Australia Ltd* (1997) 75 FCR 216 to determine a no case to answer submission in that ruling.

*5.* Thus, in both *CR v Clerk* as well as *CR v Mishra* (supra) the thresh-hold issue if a no case to answer submission cold be allowed or entertained in disciplinary proceedings before the Commission has not been considered or adverted to.

However, in the rulings of *Narayan and Marawi (supra)* Commissioners have specifically considered if a no case to answer submission cold be made, allowed or entertained in proceedings before the Commission. In these rulings it is stated that no case to answer submissions have been made due to the *misconception of the nature of these proceedings* and *the misunderstanding throughout the profession and in particular by the practitioner in that matter, of the exact nature of proceedings in the Commission.*

6. In *Chief Registrar v Marawai (supra),* after the applicant closed the case, some respondents made no case to answer submissions. Commissioner Justice Paul Madigan, refusing the respondent's application as being misconceived held thus:

> *"Mr. Chaudhry's application is based on a misconception of the nature of these proceedings. This is not a trial where charges with specific penalties are laid against practitioners who the Chief Registrar believes have offended against the rules of practice and procedure."*
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> *"The Legal Practitioner's Decree clearly sets out a procedure for the instigation of proceedings before the Commission. By Section 99 she receives complaints, they are investigated under Section 100, she can call for an explanation (Section 105) and if deemed appropriate, she may then commence proceedings before the Commission (Section 111). As can be seen, no charges as such are laid."*
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> *"The Commission then conducts a hearing into the Chief Registrar's application (Section 112) and will decide after hearing whether the practitioner has "engaged in professional misconduct or unsatisfactory professional conduct" (Section 121(1)) and then will move to make appropriate orders."*
>
> *"There being no charges laid as there are in Court proceedings, it is not open to the Respondent to move a no case submission. It will be after a*

*proper hearing into the application laid by the Chief Registrar that the Commission will decide whether the allegations are established or not."*

*"The definitions of "professional misconduct" or "unsatisfactory professional conduct" as set out in Sections 81 and 82 and further exemplified in Section 83 are but definitions of misconduct to aid the Commission in its deliberations. They are not, and never could be interpreted as, charges."*

7. Then in *Chief Registrar v Narayan* (supra) Commissioner Justice Paul Madigan considering the same issue opined that;

*'There appears to be quite a misunderstanding throughout the profession and in particular by the present practitioner, of the exact nature of proceedings in the Commission when an allegation has been referred to it by the Registrar for hearing. The operative word is hearing and not trial. Although the Commissioner and the Commission have the roles of Judge of the High Court and the High Court respectively, hearings before the Commission are hearings by way of an enquiry and not adversarial trials. As such formal rules of evidence do not apply (see section 114 of the Decree) and it will only be in exceptional circumstances that interlocutory applications and no case applications will be entertained. The whole purpose of a hearing before the Commission is to establish the validity of the application made by the Registrar and if so established to then make an appropriate penalty order; at all times seeking to protect the interests of the consumer public, while endeavoring to maintain high standards of ethics and practice within the profession.'*

8. The sum total of these decisions is that, there being no charges laid as in Court proceedings the proceedings before this Commission are not trials but hearings by way of an enquiry and not adversarial trials, it is not open to the Respondents to move a no case submission as a matter of right or course and it will only be in

exceptional circumstances that interlocutory applications and no case applications will be entertained. It is clearly held that applications for no case to answer have been made due to the misconceiving the nature of the proceedings before this Commission. Thus, it is opportune to consider as to how the nature of proceeding in this Commission are different from that of a court, criminal or civil.

**Nature of Proceedings**

9. The proceedings before this Commission are disciplinary proceedings which according to the provisions of the LPA this is clearly so. Proceedings are instituted under Section 111 (1) which states that an application will be made with the allegations. This is followed by Section 112 which states that there will be a *hearing* and that it is an *inquiry* also referred to as *disciplinary proceedings*. The sum total of the use of the said terms is that without doubt the proceedings are disciplinary in nature and it is an inquiry that is conducted by this Commission. As we proceed further Section 112 (4) provides that the Registrar or the Complainant shall appear and *assist* the Commission in its inquiry. This is a clear indication that the Registrar does not prosecute but assists the Commission with the inquiry. This considered with Section 114 which provides that the Commission is not bound by the formal rules of evidence puts it beyond doubt that the nature of the proceedings is different and distinct from criminal proceedings or a civil proceeding and is *sui generis.* The Commission is required to inquire into and determine the reference-vide section 112 (4). Thus, the proceedings are not strictly adversarial but more inquisitorial in nature.

10. Hence, this unique and distinct nature of proceedings have been considered and recognized in the rulings of *Narayan* and *Marawi (supra).* However, I most respectfully observe that in the rulings of *CR v Clerk* and *CR v Mishra* (supra) the Hon. Commissioner has not appreciated and adverted to this subtle but important difference and thus have adopted and followed the procedure and principles of criminal proceedings in entertaining applications for no case to answer in those

matters. In these circumstances I observe that the correct legal position is depicted in *Chief Registrar v Marawai* (supra) and *Chief Registrar v Narayan* (supra).

11. As there had been a difference of opinion I have considered the position in other jurisdictions. The disciplinary proceedings against Legal Practitioners in New Zealand appear to be in many respects similar to that in Fiji. In New Zealand too the consistent position upheld as far as no case to answer applications in disciplinary proceedings is in accordance with and similar to the decisions of *Registrar v Marawai* (supra) and *Chief Registrar v Narayan* (supra) some of which are as follows.

12. In *Re C (A Solicitor)* [1963] NZLR 259 (SC) at 259, a full Court of Hutchison, Haslam and Leicester JJ observed that it:

*"... did not accept Mr Arndt's submission that a case before the Disciplinary Tribunal is to be dealt with on the same basis as a criminal trial. When a practitioner is charged before the Disciplinary Committee with professional misconduct and a prima facie case is made against him, the practitioner is not justified in simply saying the charge is not proved beyond reasonable doubt but must be prepared to answer the charge against him."*

13. In the New South Wales Court of Appeal in 1966 where it was observed *Re Veron* [1966] 1 NSWR 511 (NSWCA) at 515 :

*"From the earliest times, and as far back as the recollection of the individual judges of this Court goes, disciplinary proceedings in this jurisdiction in this State have always been conducted upon affidavit evidence and not otherwise. They are not conducted as if the Law Society ... was a prosecutor in a criminal cause or as if we were engaged upon a trial of civil issues at nisi prius. The jurisdiction is a special one, and it is not open to the respondent when called upon to show cause, as an*

*officer of the Court, to lie by and engage in a battle of tactics, as was the case here, and to endeavour to meet the charges by mere argument."*

14. In Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal, [2015] 2 NZLR 606 deciding if a no case to answer submission should be entertained in disciplinary proceedings it was held that;

***"[63]*** *This view of the hearing accords with the authorities we have cited, and the current statutory scheme. Section 3 of the Act provides that the Act's purpose is to protect consumers and maintain public confidence. This is achieved in part by providing for "a more responsive regulatory regime". As part of that regime, a Standards Committee is empowered to appoint an investigator who can in turn require a practitioner to furnish information in any form.27 This emphasises the need for co-operation and the distinction of these disciplinary proceedings from a criminal matter.*

***[64]*** *Against this background we consider the "no case to answer" jurisdiction should be seen as limited to matters akin to a strike out. It is for weeding out the obviously deficient (which should be rare) or those where some technical impediment can be argued. Otherwise it is proper that the practitioner fully participate thereby enabling the Disciplinary Tribunal to rule on the substance, and to give better effect to the Act's purposes. The type of prolonged lead up to the hearing that has occurred here is inappropriate."*

15. Finally, I would advert to the decision of Justice Basnayke, J.A., in the case of *Sen v Chief Registrar* [2016] FJCA 158; ABU0064.2014 (29 November 2016) where their Lordship considering a submission based on the assumption that the Practitioner (appellant) been charged under section 82 (1) (a) of the Legal Practitioners Act (Decree) constitutes an offence held thus;

*" [35] Section 82 (1) (a) of the Legal Practitioners Decree 2009 is concerning professional misconduct, which is not an offence. These are rules made for the*

*purpose of maintaining dignity of professional bodies. Therefore, charges of misconduct do not fall within the purview of Section 14 (1) (a) of the Constitution."*

16. This puts it beyond any doubt that the proceedings before this Commission are certainly not criminal in nature.

17. Accordingly, considering the aforesaid authorities both local and in other jurisdictions, I hold that, in disciplinary proceedings under the Legal Practitioners Act instituted before this Commission a "no case to answer" submission should be limited to matters akin to a strike out and to weed out the obviously deficient or to those where some technical impediment can be argued and it will only be in exceptional circumstances that interlocutory applications and no case applications will be entertained.

**Conclusion**

18. In the present application considering the evidence of Mr. Niazi it appears to this Commission that, *prima facie* there is a matter to be considered for unsatisfactory Professional Conduct and thus there is no probable basis of this being akin to a strike out situation or there being exceptional circumstances or matters that warrant the entertaining of a no case to answer application. Accordingly, the no case to answer submission is misconceived and I uphold the objection of the Applicant to that extent.

19. As such the Respondent's no case to answer submission fails and is rejected and this matter is set for further hearing and the Respondent is called upon to place his case before this Commission without further delay.

Gihan Kulatunga
COMMISSIONER