IN THE COURT OF APPEAL
(ON APPEAL FROM THE INDEPENDENT LEGAL SERVICES COMMISSION)

CIVIL APPEAL ABU 68 OF 2013
(ILSC No. 9 of 2009)

BETWEEN	:	**IQBAL KHAN**
		Appellant
AND	:	**CHIEF REGISTRAR**
		Respondent
Coram	:	**Calanchini P**
Counsel	:	**Mr G O'Driscoll for the Appellant** **Mr V Sharma with Mr M Waibuta for the Respondent**
Date of Hearing	:	**26 March and 14 April 2014**
Date of Decision	:	**23 May 2014**

DECISION

[1] This is an application by motion dated 19 February 2014 filed by the Appellant in person seeking amongst others the following orders:

"a) *That the orders granted by the Honourable Commissioner, Madigan J on the 11th day of December 2013 be stayed pending the Appeal;*

b) *That the Appellant be permitted to practice as a Legal Practitioner for Iqbal Khan & Associates until the hearing and determination of this Appeal;*

c) *That, alternatively, the Appellant be allowed to conduct all the trials where the date has been set down for hearing as stated in the Appellant's Affidavit pending determination of his appeal to the Court of Appeal."*

[2] The application is in effect an application for a stay of execution pending appeal. As such it is made pursuant to Rule 34(1) and Rule 26(3) of the Court of Appeal Rules (The Rules). The effect of Rule 34(1) is that the filing of a notice of appeal does not operate as a stay of execution unless the court below or the Court of Appeal otherwise directs. Under this Rule both the court below and the Court of Appeal exercise what is termed a concurrent jurisdiction. Under Rule 26(3) of the Rules, wherever an application may be made either to the court below or to the Court of Appeal, the application shall be made in the first instance to the court below. In compliance with Rule 26(3) the Appellant's application for a stay of execution was made first to the court below and dismissed on 14 February 2014 by the Independent Legal Services Commission. The present application is therefore a renewed application to the Court of Appeal for a stay of execution pending appeal. The application comes before a single judge of the Court of Appeal pursuant to section 20(1) of the Court of Appeal Act Cap 12 (the Act).

[3] The application was supported by an affidavit sworn on 19 February 2014 by Iftakhar Iqbal Ahmad Khan. The application was opposed by the Respondent who filed an answering affidavit sworn on 5 March 2014 by Kelevi Veidovi. The Appellant filed a reply affidavit sworn on 11 March 2014 by Iftakhar Iqbal Ahmad Khan. Subsequently the Appellant filed written submissions on 14 and 25 March and the Respondent filed written submissions on 19 March 2014.

[4] The hearing of the application commenced on 26 March 2014. It was adjourned part heard to 14 April 2014 due to default by the Appellant in the filing of supplementary

submissions the day before the hearing. During the course of the hearing on 14 April 2014 Counsel for both parties briefly addressed the Court on the principal issues raised in their written submissions. During the course of submissions it was agreed by Counsel that paragraphs (4) (i) – (p) in the affidavit sworn by Khan on 11 March 2014 should be expunged.

[5] The background to the application may be stated briefly. Initially the Appellant appeared before the Commission on 25 allegations of professional misconduct under the Legal Practitioners Decree 2009 (the Decree). For the purposes of the present application it is only necessary to state that the Appellant appeared before the Commissioner on those complaints for mention on 11 March 2013.

[6] The hearing of the complaints was fixed for 5 – 15 November 2013. Three days before the hearing was to commence, the Appellant filed an application in the Commission for the Commissioner to recuse himself. The application was heard on 5 November 2013 and in a brief written Ruling dated also 5 November 2013 the application was refused by the learned Commissioner.

[7] The Respondent had decided to proceed by way of an amended complaint on only four of the original 25 allegations when the hearing was due to commence on 11 November 2013, having been adjourned from 5 November 2013 at the request of the Appellant. However on 8 November 2013 the Appellant applied to have the remaining hearing dates vacated due to ill health. In an ex tempore ruling delivered on 11 November 2013 the application was refused by the Commissioner on the basis that it was not properly founded and amounted to a delay tactic by the Appellant. The Appellant did not appear but was represented by Counsel at both the application to vacate and the resumed hearing. The Respondent then informed the Commission that he was proceeding on only two of the four allegations in the amended complaint.

Those two charges were:

> *"COMPLAINT 1A*
>
> *On 28th of January 2009, Mr Iqbal Khan failed to conduct himself in a professional manner when he appeared on Fiji One*

News at 6pm and made open derogatory remarks saying "..... the police officers grabbed him from his house, drag him, take him to police station, keep him there, and assault him ....." and he added "we are suing the police officers individually, so they'll have to sell their underwear to pay the damages, because this report speaks for itself, this is a police medical report where they confirm that this person was assaulted in police custody .....", which comments were against the Police officers who were involved in a matter concerning his client on National Television, which conduct was an act of professional misconduct.

COMPLAINT 1B

On 28th of January 2009, Mr Iqbal Khan failed to conduct himself in a professional manner when he appeared on Fiji One News at 6pm and openly talked about the proceedings in the High Court matter no. 31 of 2009 Faiyaz Khan v Inspector Abdul whilst the proceedings were still pending which conduct was an act of professional misconduct.

COMPLAINT 4

IQBAL KHAN a legal practitioner, between the 28th of March 2008 and the 29th of March 2008 in his capacity as principal of Iqbal Khan & Associates, having received the sum of $500 from Mohammed Yunus Hussain, failed to disclose to Mohammed Yunus Hussain that he was also acting for Alvin Raj the co-accused who had conflicting defences in the criminal matter the said Mohammed Yunus Hussain was charged thereof, falling short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner, which conduct was an act of professional misconduct."

[8] Counsel for the Appellant entered pleas of not guilty to both complaints on behalf of and in the absence of the Appellant. The Respondent called two witnesses to establish the allegations. There was no evidence adduced on behalf of the Appellant. The Commission concluded that the allegations in complaints 1A, 1B and 4 had been established and found that they constituted professional misconduct in each case. In respect of the first count (complaints 1A and 1B) the Appellant's practicing certificate was ordered by the Commission to be suspended for a period of 15 months with immediate effect. On the second count (complaint 4) the Appellant's practicing certificate was suspended for a period of 15 months with immediate effect. Both suspensions were ordered to take effect concurrently. The Appellant was as a result

not eligible to apply for a practicing certificate until March 2015. He was ordered to pay costs of $1500.00 to the Commission by 10 January 2014. Finally the Appellant was publicly reprimanded.

[9] The Appellant initially filed on 25 November 2013 a notice of appeal against the interlocutory decision of the Commission delivered on 5 November 2013 that had determined the Appellant's application for recusal. The Appellant then filed a further notice of appeal on 17 January 2014 against the final judgment of the Commission delivered on 11 December 2013. That notice of appeal included grounds that replicated the grounds relating to the issue of recusal. Later, on 22 January 2014 the Appellant filed a further document being *"Amended/Additional Grounds of Appeal."* All three notices had been filed within the time prescribed by Rule 16 of the Rules. There is a great deal of repetition in these documents and for the purposes of determining this renewed application for a stay pending appeal, the notice filed on 22 January 2014 will be taken as the Appellant's notice of appeal. The grounds upon which the Appellant challenges the Orders of the Commission are stated in that Notice to be:

> *"1. **THAT** the Learned Commissioner Honorable Justice Paul Madigan erred in law by misdirecting himself as to the application of the principles for disqualification of a Tribunal or Commission from hearing a complaint on the ground of a perception of or of apparent bias despite citing the leading authorities on the issue of bias and having personal knowledge or having had the appreciation of those matters raised by the Appellant in the written and oral submissions. The Learned Commissioner Honorable Justice Paul Madigan erred in applying the test for disqualification;*
>
> *2. **THAT** the Learned Commissioner Honorable Justice Paul Madigan erred And/or misdirected himself in law in fact in holding that "an observer who was "reasonably informed" **of these facts would not now say, two and half years later, that I could not turn an impartial ear to the Practitioner's disciplinary matters."** The Learned Commissioner Honorable Justice Paul Madigan erred in applying the test for disqualification;*
>
> *3. **THAT** the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact in his conclusion by ignoring the often cited phrase that **"justice must not only be done but seem to be done"**, of which the latter is inherently impossible when the Court Record confirmed that the Commissioner did make a statement to the effect*

that the Appellant was "dishonest" in a Criminal matter in the Case of Shirley Sangeeta Chand vs. State in Lautoka High Court Action No. HAC 20/2009.

4. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in disregarding the legal principles and/or not taking into serious consideration of the comprehensive written submissions supported by legal authorities containing over 160 pages when the Commissioner just took over fifteen minutes break to make a decision on the Appellant's application for recusal. Such disregard to the propositions of law denied the appellant a fair hearing and as such caused a substantial miscarriage of justice.*

5. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and made a grave error when he refused to recuse himself from hearing the Appellant's case after it was brought to his attention that he had previously pre-determined the character of the Appellant as "dishonest" (as per Court Record – page 183 in the case of* ***HAC 024 OF 2009)*** *when he wrongly stated in his ruling that* ***"paragraph 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. I had ruled that the prior statement not go to the assessors as an exhibit (UNDERLINE MINE). 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."*** *The Appellant states that the Learned Commissioner's statement above was contrary to the court record of what happened on the day in question and hence a grave error made by the Learned Commissioner when he mistaking the evidence relied upon in support of, and thus basis of, the disqualification application.*

6. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact in not granting an adjournment to the Appellant when the Appellant would be available to give evidence and call witnesses since the Appellants complaints were set down for 8 days and the 2 complaints were completed within 2 hours. Such refusal to grant an adjournment to the Appellant was in breach in Section 142 (c) of the Constitution of The Republic of Fiji 2013.*

7. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact in finding that the Appellant was guilty of*

professional misconduct in Complaint No. 1 when the evidence tendered before the Commissioner did not prove beyond reasonable doubt the allegations against the Practitioner. Full particulars will be provided upon receipt of the Tribunal record.

8. ***THAT*** *the Learned Commissioner Learned Honorable Justice Paul Madigan erred in law in misdirecting himself on the laws regarding* ***"what is sub judice"*** *when finding the Appellant guilty of his actions that were sub judice when the Appellant appeared on National News on TV 1 and carrying Writ of Summons which showed the name of the Complainant. Full particulars will be provided upon receipt of the Tribunal record.*

9. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact in finding that the Appellant was guilty of professional misconduct in Complaint No. 4 when the evidence tendered before the Commissioner did not prove beyond reasonable doubt the allegations against the practitioner. Full particulars will be provided upon receipt of the Tribunal record.*

10. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact in shifting the burden of proof when he stated in paragraph 25 of his judgment* ***"that the practitioner was only representing Alvin on instructions but there is no evidence of that before the Commission."***

11. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact in denying or giving an opportunity to the Appellant to mitigate before the sentence that was pronounced by The Commissioner. By failure to do so The Commissioners action was in breach of the rules of natural justice.*

12. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact when he failed to disclose to the Appellant that after the Complainant No.1 had given evidence before the Commission on the 3rd day of December, 2013 the complainant had written to the Commission withdrawing the complaint against the Appellant before the decision was made.*

13. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact when not taking into consideration the Complainant No.1 letter withdrawing the complainant against the Appellant at mitigating factor in mitigation of sentence.*

14. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan's actions in suspending the Appellant for 15 (Fifteen) months to take immediate effect on the day of the judgment was arbitrary, harsh, unreasonable and contrary to the administration of justice and Rule of Law and legal authorities.*

15. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact when he heard the Appellants complaints as he was denied his right to have his matter determined by an Independent and Impartial Tribunal* ***Contrary of Section 15(2) of the Constitution of the Republic of Fiji 2013.***

16. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigans Order in suspending the Appellant for 15 (Fifteen) months was too harsh and excessive and disproportionately severe punishment* ***Contrary of Section 11 (1) of the Constitution of The Republic of Fiji 2013.***

17. ***THAT*** *the Learned Commissioner Honorable Justice Paul Madigan erred in law and in fact in denying the Appellant to response to Respondents Submissions which contained highly prejudicial facts."*

[10] The principles that are usually considered by a court when determining whether there are sufficiently exceptional circumstances for the grant of stay relief pending appeal have evolved from cases that usually involve money judgments (See: **Native Land Trust Board –v- Shanti Lal and Others** unreported CBV 9 of 2011; 20 January 2012 per Gates CJ). However as Marshall JA pointed out in **Naidu –v- The Chief Registrar** (unreported ABU 38 of 2010; 2 March 2011) the position is different in a case where a regulator in the person of the Chief Registrar representing the public interest has been successful in proceedings before a disciplinary tribunal. The Chief Registrar is the regulator of the legal profession under the Legal Practitioners Decree 2009 and in opposing an application for stay pending appeal as the successful party in the disciplinary proceedings at first instance he acts in the public interest. Thus it is the public interest that assumes a far greater significance in such applications than might otherwise be the case in stay applications involving money judgments.

[11] In proceedings before a disciplinary tribunal the only special circumstances standing in the way of the successful regulator enjoying *"the fruits of the judgment"* would be the fact that the appeal may be rendered nugatory in the event that a stay is not granted. However that is unlikely to be the position in this case since there is every likelihood that the appeal will come on for hearing in the Court of Appeal before March 2015.

[12] Although admittedly a substantial part of the period of suspension of the Appellant's practising certificate will have passed by the time the appeal is heard, it is my view that this consideration alone is not sufficient for the Court to exercise its discretion in the Appellant's favour. As noted earlier, this view is based on the premise that the Respondent represents an important public interest. The public interest that the Chief Registrar as regulator is concerned with is the protection of the public from a provider of legal services in the person of the Appellant who has been found guilty on two counts of professional misconduct. Under such circumstances the public interest in the determination of a stay pending appeal application is entitled to significant weight. In **New South Wales bar Association –v- Stevens** 52 ATR 602 Spigelman CJ at paragraph 108 stated:

> *"In such a context the exercise of the Court's power to stay must give significant weight to the protection of the public and the public interest involved in ensuring that persons who practice the profession of law comply with the highest standard of integrity."*

[13] It follows that a legal practitioner in the position of the Appellant must show that there is a cogent reason constituting special circumstances to justify granting a stay. As Chesterman J in **Legal Services Commissioner –v- Baker** [2005] QCA 482 at paragraph 28 observed:

> *"In particular it should be accepted that an application for a stay of a recommendation that his name be removed from the roll of Legal Practitioners should show a cogent reason for the stay, and he will not do so merely by showing that he will be unable to practise his profession until his appeal is heard and allowed. Every practitioner who is suspended from practice or whose name is removed from the roll suffers that prejudice but it is clearly not right that a stay is, or should be granted as a matter of course. Something more must be shown than must be such as outweigh the public interest in having unfit practitioners debarred from practice. That interest is to be afforded particular significance."*

[14] The Appellant in his written submissions claimed that the Commissioner failed to adequately consider the principles of natural justice when he found that the Appellant had engaged in professional misconduct. Later in the submission the Appellant states that *"we are contemplating bias in the present case My Lord and the unfair sentence meted out to the Applicant."* The crux of this submission is stated as being that *"we*

submit that the 15 months suspension imposed on the Applicant is unwarranted. In view of the evidence presented and the mitigating comments if an opportunity was given." It would appear that the Appellant is claiming that he was denied natural justice in the sense that he was not given the opportunity to mitigate before the orders were made. He also raises the issue of bias and claims that the suspension was unreasonable or excessive. Although the record of the proceedings before the Commissioner is not yet available, it would appear that in making his orders, the learned Commissioner heard Counsel and took into account the relevant matters that should have been considered in determining the appropriate orders. As for the 15 months suspension, at best the submission that it is excessive is arguable. It is not sufficiently cogent to outweigh the public interest.

[15] The issue of bias is raised by the Appellant not so much in relation to sentence but more so in relation to an interlocutory ruling delivered by the Commission in which the Commissioner dismissed the Appellant's application that he recuse himself.

[16] The Appellant's application before the Commission was filed on 31 October 2013 just two working days before the hearing of the complaints which was to commence on 5 November 2013 and for which 8 days had been allocated. It was the third recusal application filed by the Appellant. The first two were filed in December 2009 and June 2010 in relation to the previous Commissioner before whom the same complaints had been set down for hearing. Both those applications had been refused. Not surprisingly the present Commissioner took the view that the third application was an abuse of process and a delaying tactic. However, the Commissioner proceeded to consider the application on its merits. In a written ruling delivered on 5 November 2013 the learned Commissioner refused the application.

[17] The submissions by the Appellant on this issue are substantial with a considerable amount of case law authority. The issue concerned the Commissioner's reference to the Appellant's use of a *"dishonest tactic"* in the absence of the assessors during the course of a much earlier trial in which the Commissioner was the trial judge. Since that trial the Appellant has appeared in proceedings before the Commissioner sitting as a trial judge and as an appellate justice without the Appellant making any application that the Commissioner should recuse himself. It is only in the present

proceedings that the application was made and in these proceedings it is the third such application. Whilst the grounds relating to bias and recusal may be arguable, they go no further than arguable.

[18] The Appellant also raises the issue of the public interest and his professional obligations to his clients during the period of suspension. It is appropriate to comment briefly on this issue. It is sufficient to note that there are many able practitioners in Lautoka and the surrounding towns who are more than capable of ensuring that the Appellant's clients will have their proceedings completed according to law. The fact that some of these proceedings are proceeding in court at short notice is not a reason for granting a stay. Furthermore, any consequential short term hardship to employees and staff of the Appellant's law firm is not a sufficiently special circumstance to outweigh the public interest that is of paramount consideration in such cases as the present.

[19] The Appellant relies on the concession by the Respondent that some of the other grounds in the Appellant's Notices of Appeal are arguable. On this point it is necessary to again refer to the decision of this Court in **Naidu –v- The Chief Registrar** (supra). It was noted by Marshall JA that a second consideration may affect the exercise of the discretion in favour of an applicant for a stay of execution. If there is any ground of appeal that has an exceptional chance of succeeding then that ground may become a special circumstance to be considered with the other applicable principles, particularly the public interest, in determining whether there is justification for granting a stay. However it needs to be stressed that this consideration will only become relevant to the exercise of the discretion if the Appellant can establish that the chances of success are exceptional. As Lord Esher MR in **Atkins –v- Great Western Railway** (1885 – 86) 2 Times Law Reports 400 observed:

> *"_ _ _ strong grounds of appeal is no reason for no one ought to appeal without strong grounds for doing so _ _ _."*

[20] It is therefore necessary to determine whether any one of the Appellant's grounds of appeal meets the high threshold of exceptional chances of success that may constitute a special circumstance to be considered together with the other factors relevant to the

present application. However this process does not involve a consideration of the merits of the grounds of appeal for the simple reason that it is not for a single judge of the Court of Appeal to determine the appeal itself. That remains the function of the Court of Appeal.

[21] The Appellant has filed written submissions on grounds 1 – 5 under the heading of bias which relates to the issue of recusal. I have already discussed this issue earlier in this decision. The learned Commissioner concluded that a reasonable and informed observer could not reasonably have apprehended or perceived bias on the part of the Commission. Having read the decision refusing the Appellant's application for the recusal of the Commissioner, the grounds of appeal raised by the Appellant can at best be described as arguable. In my judgment the grounds do not have exceptional chances of succeeding.

[22] The remaining grounds 6 to 17 are dealt with by the Appellant together under a number of headings. The issues raised are essentially concerned with (i) the refusal to vacate the hearing date, (ii) the lack of an opportunity to mitigate, (iii) what constitutes misconduct, (iv) natural justice and (v) the severity of the sentence.

[23] So far as the grounds of appeal encapsulate these issues, having considered the Appellant's submissions I am not satisfied on the material that is presently before the Court that any one ground has an exceptional chance of succeeding. In my judgment the best that can be said in relation to the issues raised in the grounds of appeal is that there are some grounds that may be described as arguable.

[24] Whether the hearing dates should have been vacated is only arguable in view of the many delays that had resulted from previous applications by the Appellant. Whether there was any denial of natural justice is at best arguable since the Appellant was represented by Counsel and ample opportunity had been given for the Appellant to arrange for the attendance of witnesses whom he may have wanted to call. I have already discussed the issue of mitigation. What constitutes misconduct and whether the sentence of 15 months suspension was harsh and excessive are questions for the Court of Appeal. Both issues are arguable but do not meet the threshold of

exceptional chances of succeeding. It must be recalled that the proceedings in the Commission are civil in nature (section 116(2) of the Decree).

[25] For the reasons stated in this decision the application for a stay in its various forms is dismissed. The Appellant is ordered to pay costs to the Respondent fixed summarily in the sum of $1,500.00.

Orders:

(1) *Applications for stay pending appeal are dismissed.*

(2) Appellant to pay costs in the sum of $1,500.00 to the Respondent within 28 days.

COURT OF APPEAL FIJI

W. Calanchini

HON. MR JUSTICE W. D. CALANCHINI
PRESIDENT, COURT OF APPEAL