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

CIVIL APPEAL ABU 49 OF 2013
(ILSC No. 16 of 2013)

BETWEEN : **MUHAMMED AZEEM UD-DEAN SAHU KHAN**

Appellant

AND : **CHIEF REGISTRAR**

Respondent

Coram : **Calanchini P**
Lecamwasam JA
Wati JA

Counsel : **Mr D Sharma with Ms N Choo for the Appellant**
Mr A Chand for the Respondent

Date of Hearing : **12 May 2014**

Date of Judgment : **30 May 2014**

JUDGMENT

Calanchini P

[1] The Appellant appeared before the Independent Legal Services Commission (the Commission) on an allegation of professional misconduct in a complaint filed by the Respondent. The allegation of misconduct was that:

"Mr Muhammed Azeem U-Dean Sahu Khan a legal practitioner, since 2009 to date has represented on his letterhead that he has been called to the Lincoln's Inn, such representation being false, misleading or deceptive or likely to mislead or deceive the public contrary to Rule 2.1 (1) (a) of the Rules of Professional Conduct and Practice of the Legal Practitioners Decree 2009 which conduct was a contravention of section 83(1) (a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct."

[2] When the Appellant appeared before the Commission for the first mention on 15 July 2013 he admitted the allegation in the complaint. It would appear that the Appellant presented his mitigation submission to the Commission on the same day. The Respondent also presented an oral submission on aggravating factors and subsequently filed written submissions on penalty. It would appear that the Appellant initially declined to make any written submissions. However in answer to the Respondent's written submissions, the Appellant belatedly filed written submissions.

[3] On 30 July 2013 the Commission made the following orders:

"1. The Respondent (Sahu Khan) is publicly reprimanded.

2. There be no further reference to Lincoln's Inn on letterheads or business cards of the Respondent (Sahu Khan)

3. The Respondent's practising certificate is suspended for a period of eighteen months from the date of this judgment and he will be eligible to apply for a practising certificate from 1st of March 2015.

4. The Respondent is fined the sum of $20,000 (being a sum equal to that he has donated to charity) to be paid to the Independent Legal Services Commission such fine to be paid by 30th of August 2013."

[4] Counsel for the Appellant informed the Court that the Appellant had complied with the Order to pay the fine of $20,000.00. The Chief Registrar has appointed a receiver of the Appellant's legal practice.

[5] By notice of appeal dated 30 August 2013 the Appellant sought an order from this Court that the orders made by the Commission on 30 July 2013 be partially set aside.

The Appellant's appeal is limited to the order that he be suspended from practising law for 18 months and to the order that he pay a $20,000.00 fine.

[6] The grounds of appeal are stated to be as follows:

> *"[1] THAT the said sentences whilst according to law, were unreasonable and manifestly harsh having regard to all relevant circumstances.*
>
> *[2] THAT the learned Commissioner erred in fact in assuming at paragraph 9 of the judgment that the Appellant had sought to give evidence of his large financial resources and was trying to curry favour with the Commission by submitting by way of further mitigation a newspaper article regarding a donation to charity that the Appellant had made.*
>
> *[3] THAT the learned Commissioner at paragraph 19 of the Judgment erred in fact and read out of context the Appellant's intentions of offering to pay a penalty by holding that the Appellant did not appreciate the gravity of his offending when he offered to pay a fine for having inconvenienced the Commission.*
>
> *[4] THAT the learned Commissioner failed to take into account the extent and the basis of the maximum penalty sought by the Chief Registrar where punishment was called for in terms of a 12 month suspension and fine of between $7,000.00 and $12,000.00 both of which the learned Commissioner exceeded and in the circumstances such penalty was disproportionate to the sentence sought by the Chief Registrar.*
>
> *[5] THAT the learned Commissioner failed to give due weight to the following factors:*
>
> > *(a) The Appellant's circumstances in relation to his legal practice, his clients and his employees*
> >
> > *(b) The Appellant had acknowledged his error*
> >
> > *(c) The Appellant had shown remorse*
> >
> > *(d) The Appellant had already taken steps to remedy the offending conduct*
> >
> > *(e) The Appellant was a first offender with no history of complaints."*

[7] The background to the allegation was conveniently stated by the learned Commissioner in his judgment and may be paraphrased to say that the letterhead of the Appellant's law practice since 2009 has referred to the Appellant as being a *"Bar-at-lat (Lincoln's Inn)"* which was a misrepresentation on two counts. He was and is not a UK Barrister and he is not a member of Lincoln's Inn. The Appellant had, while resident in the UK been a student member of Lincoln's Inn but had withdrawn from study and from sitting Bar Finals because of financial constraints.

[8] It would appear that the Appellant had completed his law degree at Thames Valley University in London. He was not admitted to practice law in the UK. Upon his return to Fiji he obtained a Professional Diploma in Legal Practise and was subsequently admitted to practise in Fiji on 14 September 2001.

[9] The evidence before the Commission clearly established that the Appellant, not having passed the Bar Finals nor having been called to the Bar, was not entitled to claim to be of Lincoln's Inn. The Commission found the allegation was established. In doing so the Commission described the Appellant as having held himself out to be more qualified to practise than he in fact was. To do so was described as dishonest. It was a disservice to the public. It was a deception that was visible for all to see. It did not matter that there was no proof of actual deception. In Fiji, such proof was not likely to be readily available. That however was not the point. In my judgment that fact was an aggravating matter since the Appellant thought his deception would go unnoticed. The Commission discounted the submission that the Appellant did not practise as an advocate. It was also irrelevant that the Appellant's father may have been initially responsible for the description of the Appellant's qualifications on the letterhead of the firm. The offending material had been present on the letterhead for at least three years without any evidence that the Appellant had made any effort to correct the misrepresentation.

[10] It is clear that the misrepresentation breached Rule 2.1 (1) (a) of the Rules of Professional Conduct and Practice which states:

> *"No stationery or any advertising undertaking by a practitioner shall contain any statement which:*

> (a) *is false, misleading or deceptive or likely to mislead or deceive."*

Such a breach is capable of being professional misconduct under section 83 (1) (a) of the Decree. I agree with the learned Commissioner that in this case the breach did amount to professional misconduct. There was an element of dishonesty involved in this breach.

[11] In determining the appropriate disposition of the established complaint of professional misconduct the learned Commissioner set out in paragraph 18 the factors that formed the basis of his Orders.

> *"This is a borderline case of the practitioner's name being struck from the roll, but for his co-operation, his seemingly genuine remorse at the hearing, the lack of evidence of any other malpractices, and the possibility of his redeeming himself; a period of suspension along with a substantial fine would suffice for this misconduct."*

[12] I have no doubt that these matters were quite proper factors to be taken into account as mitigation. They were, however to be considered and balanced with the aggravating factors that were also clearly outlined and discussed by the learned Commissioner and to some of which reference has already been made in this decision.

[13] The principal ground of appeal against the penalties of suspension and fine is that they are both unreasonable and manifestly harsh having regard to all the relevant circumstances. It seems to me, however, that the concession by the Appellant that the penalties imposed by the orders were according to law negates the claim that they were manifestly harsh. The remaining grounds of appeal in effect particularise the general complaint that underlies the first ground of appeal.

[14] At the outset it should be noted that there is no guidance in the Decree as to what factors ought to be considered when determining an appropriate penalty for an established complaint of professional misconduct. The range of orders that are available to the Commission in section 121(1) of the Decree apply to findings of either professional misconduct or unsatisfactory professional conduct. It is clear that, upon a careful reading of sections 81 – 83 of the Decree, a finding of professional

misconduct is to be regarded as more serious than a finding of unsatisfactory professional conduct.

[15] During the course of his submissions before the Court and in his written submissions Counsel for the Appellant submitted that the necessary guidance can be obtained from section 4 of the Sentencing and Penalties Decree 2009. Although section 4(2) does provide a list of a number of matters to which the Commission may usefully have regard, it must be recalled that section 4(1) (a) clearly states that the first purpose for which a sentence is to be imposed is to punish offenders to an extent and in a manner which is fact in all the circumstances. However the case authorities decided in jurisdictions where there is in place legislation similar to the Legal Practitioners Decree suggest that the disciplinary powers of the Commission are not to be exercised for punitive purposes but for the maintenance of proper standards in the legal profession and for the protection of the public at large in their dealings with legal practitioners: **Legal Practitioners Complaints Committee –v- Pepe** [2009] WASC 39. This was a decision of the Full Bench of the Supreme Court of Western Australia dated 25 February 2009. The Court also observed that the disposition of the established complaint of professional misconduct should be *"consonant with the need to preserve the standing and reputation of the profession of the law in the eyes of the community."*

[16] It is therefore essential that the Commission, as in my opinion the Commission was in this case, be always cognisant of the objectives of its disciplinary powers and that any disposition reflects those objectives. In my judgment such an exercise will not always be assisted by a diligent application of the provisions of section 4 of the Sentencing and Penalties Decree.

[17] Counsel for the Appellant also urged the Court to provide a guideline judgment for the assistance of practitioners and the Commission. Apart from the fact that at present there is no discernible basis for concluding that there is a need for such a judgment, the procedural requirements prescribed by sections 6 – 9 of the Sentencing and Penalties Decree have not been met.

[18] It is conceded by the Appellant in his first ground of appeal that the sentences under challenge were according to law. The issue raised by the appeal is whether the orders were unreasonable and manifestly harsh. There are in fact two concepts raised, which do not necessarily amount to the same issue. As I noted earlier in this decision, it is difficult to reconcile a concession that the sentences were according to law and then claim as a ground of appeal that they were manifestly harsh. Furthermore, this ground raises an issue relating to jurisdiction. The proceedings before the Commission have since its inception been regarded as civil proceedings where the standard of proof is somewhere between the balance of probabilities and beyond reasonable doubt depending upon the seriousness of the allegations in the complaint. The appeal to this Court comes as a civil appeal under Part III of the Court of Appeal Act Cap 12 (the Act). Under section 13 of the Act the Court of Appeal has for the purpose of hearing and determining civil appeals, the same power, jurisdiction and authority as the High Court. However appeals in relation to penalties and orders that impose penalties usually come before the Court of Appeal as criminal appeals under Part IV of the Act. Under section 21 (1) (c) the leave of the Court would be required to appeal against a sentence passed on conviction. More importantly, under section 23(3) of the Act, on an appeal against sentence the Court of Appeal will if it thinks that a different sentence should have been passed, quash the sentence and pass such other sentence warranted by law by the verdict or it may dismiss the appeal. It would appear that under section 23(3) the appeal against sentence will only be allowed if the Court of Appeal considers that the penalty imposed was not one warranted by law as a result of the verdict. Whether the penalty was unreasonable is not an issue that the Court of Appeal considers in determining an appeal against sentence under section 23(3) of the Act.

[19] The question is how does the present appeal fit within the statutory provisions that define the parameters of the jurisdiction of the Court of Appeal. The jurisdiction of the Commission can best be described as hybrid. The procedures are essentially civil in nature. Under section 114 of the Decree the Commission is not bound by the formal rules of evidence but must ensure that the respondent to the complaint is afforded procedural fairness. Under section 116(2) the Commission has the same powers as a Judge of High Court in a civil trial so far as discovery and production of documents is concerned. The standard of proof is below the criminal standard of

beyond reasonable doubt. Yet the orders that can be made by the Commission under section 121 are in the form of penalties which can affect the financial and professional position of a respondent. Fines can be imposed up to $500,000.00. Then enforcement of such orders is to be by way of recourse to the High Court Rules (section 122(3) of the Decree) which can only be a reference to the enforcement provisions under the civil rules of the High Court.

[20] In the absence of any rules made by the Commission under section 128(2) of the Decree for the purpose of disposing of appeals to the Court of Appeal from any order of the Commission, it must follow that the Court of Appeal Rules must govern such appeals.

[21] I have already outlined the issues that emerge under the Court of Appeal Rules on an appeal from an order made by the Commission in the exercise of its hybrid jurisdiction. It is my view that the hybrid jurisdiction of the Commission necessarily implies that a hybrid jurisdiction must be found under the Court of Appeal Rules. What this means is that although an appeal, whether against a finding of professional misconduct or against an order imposing a penalty, comes to the Court of Appeal as a civil appeal regulated by the civil appeal rules, when the Court determines an appeal against what is in effect a sentence, it should do so under section 23(3) of the Act. In other words, an appeal against an order of the Commission imposing a penalty is to be decided on the basis that the Court must determine whether the penalty was warranted by law. If the Court considers that a different penalty was warranted (either more or less severe) by law then it may substitute a new penalty or it may dismiss the appeal. In deciding whether a sentence is warranted by law this Court indicated in **Bae v The State** (unreported AAU 15 of 1998; 26 February 1999) that it is for the Appellant to demonstrate that the court below fell into error in exercising its sentencing discretion. The Court stated that:

> *"If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appeal Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v The King** (1936) 55 CLR 499)."*

[22] In **Legal Practitioner –v- Council of the Law Society of the Australia Capital Territory** [2004] ACT SC 13 (21 February 2014) Rajshange J took a similar view when he noted at paragraph 317:

> *"It should however be noted that the decision of the ACAT is, as submitted by the Council, a discretionary decision. It must, therefore, be set aside only if there is an error of the kind identified by the High Court in **House v The King** (1936) 55 CLR 499, 504 – 5.*

[23] In my judgment it follows that under section 23(3) a finding in favour of the Appellant on any one of the matters listed by this Court in the **Bae** decision (supra) may lead to the conclusion that the sentence was not warranted by law if the court is satisfied that as a result of the error the sentence is manifestly harsh or excessive.

[24] I have already indicated the the learned Commissioner quite properly considered a number of mitigating factors in paragraph 18 of his decision. In the written submissions filed by the Appellant, there is reference to other matters which it is submitted the Commission ought to have considered. It is only necessary to comment briefly on this aspect of the submissions. The objectives of the disciplinary powers of the Commission are to ensure the maintenance of proper standards in the legal profession, to protect the public in their dealings with legal practitioners and to preserve the standing and reputation of the profession of law in the eyes of the community [(**Legal Practitioners Complaints Committee v Pepe** (supra)]. In my judgment those objectives outweigh any individual private interest or concern of the Appellant that was put forward as a mitigating factor. There are alternative solutions for clients and staff. None of the Appellant's staff are in any way tainted by the established allegation against the Appellant. The Commission was required to exercise a sentencing discretion, not to follow the recommendations of the Respondent.

[25] There is just one matter that is of some concern and that is the explanation that formed the basis of the fine order made by the Commission. It was unnecessary and inappropriate to connect the quantum of the fine with a donation made by the

Appellant to charity. The fine was in itself within the range for the serious nature of the misrepresentation and deception. The error, such as it was, did not render the fine wrong in law. I must add that it was not made clear by the Appellant before the Commission or by his Counsel before this Court what was the reason for the Appellant at a relatively late stage in the proceedings sending by post to the Commission a copy of a newspaper article relating to his having made a $20,000.00 donation to a children's charity.

[26] The remaining question is whether the combined penalties in the two orders were manifestly harsh. There was no authority or analysis of cases from this or other jurisdiction by the Appellant to show any trend or approach to penalties that would be relevant to an assessment by this Court of the appropriateness of the orders made by the Commission.

[27] In my judgment Counsel for the Appellant attempted to under-state the serious nature of the deception. The material before the Commission indicated that in 2009 Mr M K Sahu Khan, the Appellant's father represented on the firm's letterhead that he had been called to *"Lincoln Inn"* by referring to himself as *"Bar-at-Law (Lincoln's Inn)."* Counsel informed the Court that for the Appellant's father this was correct and true. He had been called to the English Bar and he had been a member of Lincoln's Inn. On the same letterhead in 2009, the Appellant's name appears underneath his father's name with qualifications which included exactly the same *"Bar-at-Law (Lincoln's Inn)."* However, in the Appellant's case this was not true. He was not a UK Barrister and he was not a member of Lincoln's Inn.

[28] This was a deliberate attempt by the Appellant to represent himself as having exactly the same standard of professional skill, qualifications and experience as his father. The Appellant knowingly misrepresented or willingly allowed himself to be misrepresented that his qualifications were the same as his father's.

[29] The deception was compounded by the fact that after the Appellant's father passed away, the Appellant retained the same letterhead but added in brackets after his father's qualifications the word *"deceased."* Again the Appellant misrepresented that his qualifications and his fathers were the same.

[30] Clearly there must have been a reason for the intentional and deliberate misrepresentation of his qualifications. Counsel for the Appellant conceded before this Court that it would not be unreasonable to infer that one explanation was the potential for financial gain.

[31] The seriousness of the offence when considered in the context of these facts cannot in my opinion be overstated and certainly not trivialised. The integrity and honesty of the Appellant in the longer term was in issue. That is why the learned Commissioner described the Appellant's position in relation to striking off as borderline. It was open to the learned Commissioner to have concluded that the serious defect in character exposed by this case revealed a permanent unfitness to practice. However the Commissioner concluded for the reasons stated in his judgment that a substantial period of suspension would meet the objectives that form the basis of the Commission's disciplinary powers. I agree and I find no error of law in the suspension of 18 months nor in the order imposing the fine.

[32] For all of the reasons in this decision I would dismiss the appeal and award costs in the sum of $3,000.00 to the Respondent to be paid within 28 days from the date of this judgment.

Lecamwasam JA

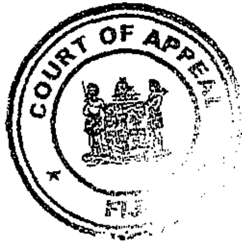
[33] I agree with the conclusion and the reasons given by Calanchini P.

Wati JA

[34] I agree with the judgment of Calanchini P.

Orders

1. *Appeal dismissed.*
2. *Appellant to pay to the Respondent the costs of this appeal fixed in the sum of $3000.00 within 28 days from the date of this judgment.*



HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL

HON. MR JUSTICE LECAMWASAM
JUSTICE OF APPEAL

HON. MADAM JUSTICE WATI
JUSTICE OF APPEAL