

IN THE INDEPENDENT LEGAL SERVICES COMMISSION
AT SUVA

No. 009 of 2019

BETWEEN: CHIEF REGISTRAR

Applicant

AND: RAJENDRA CHAUDHRY

Respondent

Applicant: Mr. T. Kilakila

Respondent: Mr. Rajendra Chaudhry in person via skype

Date of Hearing: 23rd May 2022

Date of Ruling: 22nd June 2022

INTERLOCUTORY RULING

(Application to Strike Out)

Introduction

1. The Chief Registrar commenced these disciplinary proceedings of the by making an application under section 111 of the Legal Practitioners Act 2009 (the LPA) against the Respondent with two counts of professional misconduct in contravention of section 82(1)(a) of the LPA. This Commission (the ILSC) issued notice of this inquiry by way of an email dated 26th July 2019 with a scanned copy of the Notice of Adjourned Court Date to the Respondent. The Respondent Practitioner made an application to strike off this matter by his Counsel by way of Notice of Motion and accompanying Affidavit to dismiss the charges. This interlocutory matter was taken up for hearing on 23rd May 2022 and the Respondent was heard in person via skype.

Grounds of the Strike off Application

2. According to the submissions of the Respondent Mr. Chaudhary and the reading of the written submissions the application to strike off is based on the following grounds:
 - i. that disciplinary proceedings under section 111(1) of the LPA can be instituted only against a practitioner who holds a current practising certificate and as the Respondent was not a person practising as a practitioner and not holding a current practising certificate, he is not amenable and proceedings cannot be instituted against him under section 111 (1) of the LPA.
 - ii. The second issue is, that the LPA does not give the Chief Registrar any extra territorial powers to commence disciplinary proceedings or to serve disciplinary proceedings or notice on a Practitioner who is not resident in Fiji and that the ILSC did not have power to allow an application for substituted service in view of section 145 of the LPA.
 - iii. The notices from the Chief Registrar and the ILSC have not been issued in accordance with the provisions of section 145 of the LPA
3. As regards issues 1 and 2 they are interconnected and can be considered and dealt with together. These two grounds are based on the premise that “Legal Practitioner” for the purposes of the LPA and disciplinary proceedings, is a Legal Practitioner who holds a current practicing certificate issued by the Chief Registrar, and that disciplinary proceedings do not apply to those practitioners who are not resident in Fiji. The respondent admits that his name is in the role of the practitioners and he is a Legal Practitioner admitted and enrolled in Fiji. However, he had not renewed or had a practicing certificate under the LPA since 5th October 2012. Further he had not resided in Fiji since 29th October 2012. On this basis the Respondent developed the aforesaid 1st and 2nd grounds that he is not amenable to disciplinary proceedings under the LPA.

Applicability of the LPA to the Respondent

4. The basic argument of the Respondent is that Legal Practitioner for the purposes of the LPA is a Practitioner with a valid Practising certificate and as the Respondent is neither a person practising as a practitioner nor is he holding a practicing certificate disciplinary

proceedings can not be instituted against the Respondent. Now let's consider the applicability of the disciplinary proceedings under the LPA to the Respondent. 'Legal Practitioner' is defined in Section 2 as follows;

“ "practitioner" or "legal practitioner" means a person admitted to practice as a legal practitioner under the provisions of this Decree and includes a person who before the commencement of this Decree was admitted as a legal practitioner in the Fiji Islands;” (emphasis added).

5. Thus, a person admitted to practice is a Legal Practitioner. Who is a person *admitted to practice*? Admitting and enrolment of a practitioner is provided for by part 4 of the LPA. Section 34 provides that the Chief Justice shall have the power to *admit to practice* as a practitioner a person duly qualified and upon an application for admission. The Chief Justice upon being so satisfied is empowered to admit an applicant to be a legal practitioner by virtue of section 38 (1) of the LPA. When a person is so admitted to practice as a legal practitioner such legal practitioner shall be enrolled in a book kept for that purpose in the office of the Registrar called the Role of the Court (Section 38 (2)). Considering the interpretation in section 2 along with Sections 34 and 38 it is clear and unambiguous that, 'legal practitioner' or 'practitioner' is a person who had been so admitted and enrolled.

6. For a legal practitioner to engage in active practice of the Law. He is required to obtain a practicing certificate under part 5 of the LPA Section 42 states as follows;

“42.-(1) Every person admitted to practice as a practitioner shall before commencing practice and thereafter, while continuing in practice, during the month of January in each and every year apply for and obtain from the Registrar a certificate (in this Act known as a practising certificate) certifying that that person is entitled to practice as a legal practitioner according to the laws of the Fiji Islands. The certificate shall be issued by the Registrar. "Practice" includes employment as a legal practitioner, whether in private practice or otherwise.”

7. According to the legal regime and the scheme established by the LPA if a person desires to practice as a legal practitioner such person should be in the first instance be admitted

and enrolled and then should also obtain a practicing certificate. The practicing certificate is issued by the Chief Registrar.

8. The argument is that the respondent not being a holder of a Practising Certificate and not residing in Fiji is not amenable and is not subject to the disciplinary process under the LPA. The gravamen of his argument is that the disciplinary provisions of the LPA has no application to practitioners who do not have a valid Practising Certificate.

9. The Respondent in his written submissions as well as the oral submission does not consider the provisions of Section 101 of the LPA which specifically provides for the application of the LPA to the practitioners. Section 101 reads as follows;

101.-(1) A complaint under section 99 may be made, or an investigation under section 100 may be carried out, against the conduct of any legal practitioner or law firm or any employee or agent of any practitioner or any law firm, whether or not –

(a) the legal practitioner is a local legal practitioner;

(b) the legal practitioner holds a practising certificate;

(c) the legal practitioner has ceased practising as a legal practitioner;

(d) the practitioner resides or operates a law firm, or is employed by a law firm in Fiji;

(e) the employee or agent continues to be employed by the legal practitioner or law firm; or

(f) the person making the complaint resides or works in Fiji.

(2)

(3)

10. Section 101 (1) is couched in both positive and in the negative form by the use of the words ‘whether or not’. Strictly speaking, adding “or not” to a whether-clause is superfluous or redundant as the conjunction “whether” already implies a binary choice per se. However, using “whether or not” explicitly would be necessary if we want to convey the meaning “regardless of whether,” which means that an act is possible despite any given circumstances. The effect of which is that the LPA will apply to a practitioner whether he

is a local legal practitioner or not, whether the practitioner holds a practicing certificate or not and whether the practitioner has seized to practice as a legal practitioner or not and also whether the practitioner resides or in Fiji or not.

11. This provision demarcates and determines the scope of the application of the LPA in respect of disciplinary investigations against practitioners. As explained above the fact that the practitioner does not have a valid Practising certificate and residing outside Fiji does not prevent the investigation and institution of disciplinary proceedings against any person whose name remains in the role as a practitioner. The plain meaning of Section 101 (1) is clear and unambiguous this does not require further interpretation. As such I hold that the Respondent's argument without considering and advertent to the primary provision determining the application of the LPA is thus misconceived.

Service of notice

12. Now as regards the service of notice it is common ground that during the investigations the Chief Registrar has served notices on the respondent and the respondent has placed his position before the Chief Registrar. Upon the institution of disciplinary proceedings before the ILSC the Law requires that the Respondent practitioner be notified of these proceedings at two stages. Firstly, when action is commenced under Section 111 (1) of the LPA, section 111 (5) the Registrar required to provide a copy of application to the Legal Practitioner. In the present application the Chief Registrar has by registered post forward copies of the application as well as the disclosures to the New Zealand address of the respondent. The respondent does not directly admit the receipt of the same.
13. Section 111 (5) does not specify that the point or the time of having to provide a copy of the application to the respondent. However, Section 112 (2) requires the Commission to give or cause to be given to the legal practitioner a reasonable notice of the time and place of the conduct of the inquiry. This Commission has given the said notice by way of an email to which a notice of hearing was attached. The respondent acknowledges the receipt of the same and in view of which he had participated in these proceedings. The respondent has been represented by the counsel at the outset according to the record and the

submissions copies of relevant disclosures had been made available to the respondent at some stage either directly by email or handing over to his counsel. Thus, in the present case the respondent has been provided with notice of this disciplinary proceedings and also the copy of the application had been provided to him at least in the electronic form.

14. The argument advanced by the respondent is that the notice had not been issued in accordance with the provisions of Section 145 reads as follows;

“145. Any notice or other document whatsoever required under this Act to be given or served on a practitioner or former practitioner may, unless otherwise provided, be given or served by delivering such notice or document personally to that person, or posting such notice or document by pre-paid post to that person at his or her usual or last known place of business or abode or the place of business or abode last notified by that person to the Society.”

15. The argument is that Section 145 requires personal service of notices under the LPA to start with this argument is misconceive it may be personal service or may be served by post. It was argued that the Chief Registrar or the ILSC is not empowered to issue notices beyond the territorial limits of Fiji as the LPA is a Fiji centric statute. This argument is made without reference to Section 101

16. The Third issue is the irregular service of notices. Respondent has been served with notices under registered cover to his address in New Zealand by the Chief Registrar. (he does not distinctly admit the receipt of the same). Upon proceedings being instituted by the Chief Registrar, this Commission issued notice by email as required by section 111(5) of the LPA. The Respondent’s argument is that Chief Registrar or the ILSC does not have extra territorial jurisdiction to issue notices beyond the limits of Fiji in support of this argument. The respondent submits that the LPA is Fiji Centric.

17. According to the Respondent under section 145 a notice or other document under the LPA may be given or served on a practitioner or former practitioner, by
 - a. delivering such notice or document personally to that person, or

- b. posting such notice or document by pre-paid post to that person at his or her usual or last known place of business or abode or the place of business or abode last notified by that person to the Society.

18. The Chief Registrar has forwarded the copy of this application by registered post and this Commission (the ILSC) has given notice by email. The Respondent argues that neither the Chief Registrar nor the ILSC has extra territorial jurisdiction to serve notices outside Fiji. As discussed above section 101 (1)(d) clearly makes disciplinary proceedings under the LPA applicable and amenable to Legal Practitioners whether or not they are resident in Fiji. Section 101(1)(d) reads thus;

101.-(1) A complaint under section 99 may be made, or an investigation under section 100 may be carried out, against the conduct of any legal practitioner or law firm or any employee or agent of any practitioner or any law firm, whether or not -

(a);

(b);

(c);

(d) the practitioner resides or operates a law firm, or is employed by a law firm in Fiji;

19. Persons become amenable and subject to the disciplinary process under the LPA by virtue of being admitted and enrolled as a Legal Practitioner and not on the geographical residency. Admission is upon an application of such person and thus such applicant upon admission voluntarily submits to the Jurisdiction of the ILSC and the disciplinary investigation process by the Registrar by virtue of his act of being so admitted and enrolled. A further concomitant of this is that where ever such practitioner may reside he may be sued at the domicile of the professional body he so joined and obtained membership. This necessarily follows those notices required to be given may be directed to wherever such Practitioner resides. This is not an extension of territorial jurisdiction beyond Fiji nor the extension of the writ of this Commission beyond the territorial limits but a mere

notification to a Practitioner who is subject to the disciplinary process and Jurisdiction of the ILSC and Registrar/the LPU.

Notices required to be issued

20. Under Division 3 section 99(1) of the LPA any person may make a complaint to the Registrar regarding any alleged professional misconduct or unsatisfactory professional conduct by any practitioner and by virtue of section s100 and 104 of the LPA the Registrar is empowered to investigate the conduct of a legal practitioner.
21. Under section 105(1) of the LPA the Registrar is empowered to require the legal practitioner by written notice to furnish to the Registrar within the time specified in that notice a sufficient and satisfactory explanation in writing of the matters referred to in the complaint. This is discretionary however as a matter of practice it appears that the Registrar does issue notice under this provision whenever a matter is investigated into.
22. Then by virtue of sections 109 (1) (c) read with section 111(1) of the LPA Registrar may after such investigations as it sees fit commence disciplinary proceedings before the Commission by making an application to the Commission, for one or more allegations of professional misconduct or unsatisfactory professional conduct.
23. Section 111(5) requires that the Registrar shall provide a copy of the application to the legal practitioner. In view of this provision the Registrar as a matter of Practice appear to send a copy of the application to the Practitioner upon commencing proceedings in the ILSC. In the present application too the said copy of the applications had been dispatched to the Respondent's known address in New Zealand.
24. Finally section 112 (1) provides that upon receipt of the application to commence disciplinary proceedings under section 111, the Commission shall conduct a hearing into each allegation particularised in the application and 111 (2) requires the Commission to give or cause to be given to every legal practitioner against whom an application under section 111 for disciplinary proceedings is made, a reasonable notice of the time when and

the place where the Commission is to conduct its inquiry, so that the legal practitioner may appear and be heard in person or by counsel on those disciplinary proceedings. This notice had been forwarded to the Respondent by email which the Respondent has admitted receiving.

25. The Respondent argued that the notices have not been issued in accordance with section 145 of the LPA the objection is that, there has not been service in compliance with section 145 of the LPA as there had not been personal service or service of the document the notice of adjournment from the ILSC and the copy of the application to the Respondent from the Registrar.
26. The issue for this Commission to decide is whether the notice under section 111(5) was validly served on the Respondent. Certainly, the notice in the hard copy form had not been served on the Respondent but a soft copy by email. In the current context is this substantial compliance with section 145? The notice of adjournment was delivered to the Respondent but in electronic form and not in paper form.
27. Section 145 of the LPA, specific two methods of service it does not exclude other methods of service. This was confirmed by Commissioner Judge Goundar in the case of Chief Registrar v Raza [2021] FJILSC 7 (31 December 2021) as follows:
“ [36] Section 145 of [Legal Practitioners Act](#) sets out the methods for service of notices under the Act. But the methods are not mandatory. The section does not expressly exclude other methods such as electronic service or service on the agents of the legal practitioner.”
28. Further thereto by virtue of section 5A of the Electronic Transactions Act it is now lawful for any notice to be served via electronic document. Section reads thus;
“ 5A.—(1) Where any written law, for the time being in force in Fiji, requires information or documents to be presented, stored, retained or generated in its original paper based form, such requirement is deemed to be satisfied by information contained in a data message, electronic document, electronic record or other communication in electronic form, if there exists a reliable assurance with regard to assessing the integrity of the said

information from the time such information was first generated in its final form as a data message, electronic document, electronic record or any communication or otherwise, and the said information contained in the data message, electronic document, electronic record or communication is available and can be used for subsequent reference.”

29. Thus, where any written law, for the time being in force in Fiji, requires information or documents to be presented in its original paper based form, such requirement is deemed to be satisfied by information contained in a data message, electronic document, electronic record or other communication in electronic form. Accordingly, I hold that any notice or other document whatsoever required under the LPA to be given or served on a practitioner may be given in electronic form by email.

30. In the present case the Respondent has in fact recede the notice of adjournment and was thus aware of this matter and the date of next call. The Respondent submits that he instructed only to appear for the limited purpose of supporting the strike out application with specific instructions against accepting any copy of the application or disclosures. So, for all practical purposes the Respondent has had notice of this application and is making an attempt to avoid the acceptance of the hard copy of the application. I don't think a person has such a right and in any event if he does so he cannot be heard to complain of not receiving notice as a defense. In *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 WLR 177, 185 CA (a case under the Landlord and Tenant Act 1954), Lord Salmon opined that:

“According to the ordinary and natural use of English words, giving a notice means causing a notice to be received. Therefore, any requirement in a statute or a contract for the giving of a notice can be complied with only by causing the notice to be actually received - unless the context or some statutory or contractual provision otherwise provides...”

31. There is no distinction drawn between “serving” and “giving” a notice vide; *Kinch v Bullard* [1999] 1 WLR 423, 426G.)

32. Accordingly, I hold that the Respondent has received due notice of these proceedings and that Respondent Practitioner's allegation of not receiving due notice is misconceived and frivolous.

Validity of the LPA

33. As a general argument the Respondent challenged the validity and the legitimacy of the LPA. The Respondent, in his oral as well as written submissions challenges the legitimacy and the validity of the LPA on the basis that it was a Decree promulgated by the then President without going through the process of Parliament in 2009. This Commission is not competent and is certainly not the proper forum to agitate or consider the desirability or the legitimacy of the LPA or of any other statute. However as so much was submitted on this issue it is prudent and necessary to narrate the historical evaluation of the LPA.
34. The Legal Practitioners decree was promulgated on the 22nd of May 2009. It was a Decree that was so promulgated under the legal regime that prevailed at that time and became law by virtue of the Executive Authority of Fiji Decree 2009 dated 10th April, 2009. This Legal Practitioners decree survived and remained in force until the commencement and promulgation of the current Constitution on the 7th September 2013. By virtue of section 173 of the Continuation the validity of the Decrees and laws that prevailed as at that day were preserved. This included the Legal Practitioners Decree of 2009. Further by Section 163 of the Constitution the words 'written law' was defined to include a decree and the word 'Act' was defined to mean and include a decree so promulgated. In view of the said Constitutional validation and the preservation of existing laws, the Legal Practitioners Decree continued to be valid law. Subsequently in 2016 with the consolidation of the laws of Fiji the Legal Practitioner's Decree was also included volume 20 of the consolidated laws of Fiji and all decrees were re-named as 'Acts' by virtue of the Revised Edition of Laws Act (as amended in 2016). In these circumstances to this Commission, it is apparent that the LPA has continued to be and is a valid and lawful Act.

35. For the aforesaid reasons, I have no alternative but to refuse and dismiss the Respondent Practitioner's to Strike Out application. Accordingly, the application to Strike Out is hereby refused and rejected.



Gihan Kulatunga
COMMISSIONER