IN THE INDEPENDENT LEGAL SERVICES COMMISSION
AT SUVA

No. 012 of 2020

BETWEEN: **CHIEF REGISTRAR**

Applicant

AND: **ROBINSON KAMAL PRASAD**

Respondent

Applicant: Ms. J. Sharma
Respondent: Mr. Robinson Kamal Prasad in person

Date of Hearing: 22nd June 2022
Date of Ruling: 29th July 2022

INTERLOCUTORY RULING

Introduction

1. The Chief Registrar commenced this disciplinary proceeding by way of an application under section 111 of the Legal Practitioners Act 2009 (the LPA) against the Respondent Mr. Robinson Prasad with a count of professional misconduct in contravention of section 82(1)(a) of the LPA for the failure to provide to the Chief Registrar with a sufficient and satisfactory explanation in writing of matters contained in the complaint of Ram Samujh, as required by the Notice dated 9th June, 2020 and the subsequent reminder by notice dated 7th July, 2020, in breach of *Section 108 (2)* of the *Legal Practitioners Act 2009*.

2. When this was mentioned on 26th June 2022 the Respondent Mr. Robinson Prasad appearing in person made an application that the bundle of disclosures tendered to the Commission by the Chief Registrar in respect of this Application be taken off the record

and returned to the Legal Practitioners Unit as it would otherwise cause prejudice to the Respondent. This interlocutory matter was taken up for hearing on that day and the Respondent was heard in person and he was permitted to file written submissions in the Commission Registry. However, the Respondent did not tender the written submission but on 18th of July 2022 by email requested for further time on the basis he could not complete the submissions as he has been suffering from Covid. Accordingly, he was granted further time to submit his written submission, if necessary, by email and the ruling was rescheduled for the 29th of July 2022 at 2.00 p.m. Mr. Robinson emailed an unsigned written submission around 7.00 p.m., of the 28th of July which I have considered. The signed copy was emailed around 9.00am, of the 29th of July 2022. Accordingly, the ruling is thus made.

The facts

3. A complaint had been lodged with the LPU by one Ram Samujh against the Law firm of the Respondent and notices pursuant to *Sections 104 and 105 of the Legal Practitioners Act 2009* dated 9th June, 2020 is said to have been emailed to the Respondent on the 11th of June, 2020 to which he is alleged to have failed to respond and a notice pursuant to *Section 108* of the Legal Practitioners Act dated 7th July, 2020 is said to have been then sent to the Respondent on the 8th of July, 2020. As the Respondent is said to have failed to respond to the same these proceedings have been instituted by the Chief Registrar. Copies of the following documents are said to be with the bundle of disclosures,

i. Chief Registrar's Notice dated 9th June, 2020
ii. Copy of Email dated 11th June, 2020
iii. Chief Registrar's Notice dated 7th July, 2020
iv. Copy of Email dated 8th July, 2020
v. Statement of Ms. Khashal Neha Chandra, Clerical Officer at LPU Registry;
vi. Statement of Mr. Tevita Cagina, Messenger at LPU Registry;
vii. Respondent's application form for a Practicing Certificate

The Application

4. According to the submissions of Mr. Robinson Prasad, the application is based on the premise that in view of the nature of the documents, statements and case theory filed before the Commission it will affect the mind of the Commissioner. What Mr. Prasad alleges is that the Commissioners mind will be prejudiced and will be biased (actual) or at least may give rise to the suspicion of bias (apparent). He submitted that the proceedings of this Commission are adversarial proceedings of a civil nature. Thus, he submitted that as in civil proceedings these documents may be objected to and kept out. Hence, if the said material is seen by the Commissioner or the mere presence of these documents in the Commission inquiry file will give rise to perceived bias as decided in the case of Amina Koya v State (1998) FJSC 2; CAV 1997 (2 March 1998).

5. In his written submission Mr. Prasad has elaborated on the oral submissions and in addition submitted that in view of S116 (2) of the LPA that the Registrar's application should not contain witness statement and that witnesses are to be called during hearing on Oath or by affidavit in accordance with civil procedure in a civil action and any direction for discovery and productions of documents should be made in accordance with the Civil procedure applicable to civil actions. Mr. Prasad has commenced his written submission stating that the respondent has objected and sought *clarification* from the Commissioner on certain issues. It was an objection that was raised and that is what is now considered.

Consideration of the arguments

6. The inveterate practice in this Commission in keeping with Practice directive No.1 of 2016 dated 18th June 2016 has been to serve disclosures along with the copy of the Application on the Respondent Practitioner and a copy so served is tendered to the Commission along with the Application at the point of filling the same or later. The Respondent's submission is that, if the said material is seen and perused by the Commissioner it will affect and prejudice the mind of the Commissioner (actual bias) or the mere presence of these documents in the Commission inquiry file will create a suspicion of bias (perceived bias) as decided in the case of Amina Koya v State (supra).

7. This argument is based on the premise that the proceedings before this Commission are akin to that of civil proceedings in a civil cause and it is adversarial. This is a misconception. Time and again this has been adverted and considered by this Commission and has been held to be otherwise. In **Chief Registrar v Marawai** [2012] FJILSC 9 (18 July 2012), Commissioner Justice Paul Madigan, 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."* (emphasis added).

8. Then in **Chief Registrar v Narayan** [2014] FJILSC 6; Case 009.2013 (2 October 2014) 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.'* (emphasis added).

9. The sum total of these decisions is that, the proceedings before this Commission are not trials but the hearings by way of an enquiry and is not an adversarial proceeding. Thus, now it is opportune and necessary to consider as to how and why the nature of proceeding in this Commission are different from that of a criminal or civil court.

Nature of Proceedings

10. The proceedings before this Commission are disciplinary proceedings which according to the provisions of the Legal Practitioners Act is instituted under Section 111 (1) which provides that an application be made with the *allegations*. This is followed by Section 112 according to which there will be a *hearing* and that it is an *inquiry* which also is referred to as being a *disciplinary proceeding*. The sum total of the use of the said terms is that the proceedings are disciplinary in nature and it is an inquiry that which is conducted by this Commission and is not a trial. Further Section 112 (4) provides that the Registrar or the Complainant shall appear and *assist* the Commission in its inquiry. This confirms that the Registrar or the complainant does not prosecute but only assists the Commission with the inquiry. Then section 112 (4) requires the Commission to inquire into and determine the *reference* as opposed to a criminal charge or civil dispute/claim. Then to cap it all section 114 provides that the Commission is not bound by formal rules of evidence, which 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.* Thus, the proceedings are not adversarial in nature but subject to the rules of natural justice and principles of fair hearing as the findings and sanction affect the rights of Practitioners.

11. This unique distinct nature of disciplinary proceedings is recognized even in other jurisdictions. Disciplinary proceedings against Solicitors in New Zealand appear to be in many respects similar to that in Fiji. 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."*

12. Then in New South Wales Court of Appeal in *Re Veron* [1966] 1 NSWR 511 (NSWCA) at 515 held that:

"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."

13. In Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal, [2015] 2 NZLR 606 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. This emphasises the need for co-operation and the distinction of these disciplinary proceedings from a criminal matter."*

14. 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."

15. The following observations, Katz J., was adopted and cited with approval in Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal **(supra)**;

"[29] Parliament has provided that the Tribunal is free to set its own procedure. Obviously, it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to those constraints, the Tribunal has been given a high degree of procedural flexibility in the exercise of its important statutory functions.
[30] As one Australian commentator has noted, this flexible procedure for a disciplinary tribunal means it is sui generis*. It is neither strictly adversarial nor inquisitorial in nature, reflecting that disciplinary proceedings are aimed at protection of the public as well as discipline of the practitioner. As the New South Wales Court of Appeal observed in* Malfanti v Legal Profession *Disciplinary* Tribunal*:*

"It is impossible in my view to lay down a rigid rule. The Tribunal is bound to mould its procedures to enable it efficiently and effectively to carry out its functions in an expeditious manner ..."

16. This puts it beyond any doubt that the proceedings before this Commission are certainly not criminal in nature. Accordingly, considering the aforesaid authorities both local and in other jurisdictions, it is apparent that, disciplinary proceedings under the Legal Practitioners Act before this Commission are *sui generis* and are not adversarial in nature. It is a disciplinary inquiry to ascertain the truth. This unique and distinct nature of proceedings has been considered and recognized in the rulings of *Narayan* and *Marawi (supra).* Thus the Commissioner for the due exercise of his function requires and should be provided with the disclosures to conduct the inquiry according to the provisions of the LPA filing of disclosures.

17. Justice Rajasinghe in **Ram v State [2021] FJHC 201; HAM38.2021 (29 March 2021)** specifically considered the legality and propriety of filing of disclosures in the High Court and if causes any prejudice or result in form of bias against the Accused. The defence in that case raised the objection that the filing of disclosures in the High Court is a dubious act in law, and it should be stopped immediately and since the disclosures filed in Court lead to is a reasonable apprehension that the Trial Judge may have read the evidence in the disclosures and would not thereby bring a fair and impartial mind in adjudicating the matter. This was considered in the backdrop of the repeal and the removal of the assessors' system, and the Judge becoming the sole and final adjudicator of both fact and law. Justice Rajasinghe considering the laws of Fiji, the common law as well as decisions of other jurisdictions opined that,

> *"41. Accordingly, it is clear that the duty of disclosure by the Prosecution is a part of a fair trial and the Prosecution has to exercise that duty as part of their duty to conduct the Prosecution fairly. The Court has the responsibility to ensure that the parties, including the Prosecution, conduct the proceedings fairly in order to provide a fair trial to the accused. Hence, the Prosecution owes a duty of disclosure to the Court to ensure a fair trial."* (emphasis added),
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> and held further that,
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> *"50. The common law duty of disclosure by the Prosecution is an inseparable aspect of the right to have a fair trial before a Court of law which has now been codified under Section 15 (1) of the Constitution, thus making it a law of the country. The duty of disclosure is owed to the Court and not to Defence according to the principles of natural justice."* (emphasis added)

18. Justice Rajasinghe has thus held that in adversarial criminal trials the prosecution owes a duty of disclosure to the Court to ensure a fair trial and the duty of disclosure is owed to the Court and not to the Defence in accordance with the principles of natural justice. This had been so held in the light of the submission of bias. If that be so, in an adversarial criminal trial, it is more so applicable to a *sui generis* and non-adversarial disciplinary inquiry in which the Commissioner is required to inquire, hear and determine the

allegations referred to the Commission. The purpose of the hearing is to clarify and test the evidence of the parties and the witnesses. The focus of the process will be an inquiry to ascertain the veracity of the alleged misconduct which the Commission should be satisfied on a balance of probabilities or on the civil standard. This view of the hearing accords with the authorities afore cited, and section 116 of the LPA empowers the Commission to require a practitioner (whose conduct is inquired in to) to furnish information in any form and may obtain such evidence either orally or by affidavit. The Commission is free to set and regulate its own procedure and proceedings are not adversarial in nature. However, the proceedings will certainly be subject to and in accordance with the rules of natural justice and principles of fair hearing as the findings and sanction may affect the rights of Practitioners.

19. The Respondent has failed to appreciate this subtle but important difference between criminal/civil proceedings *vis-à-vis* the disciplinary inquiry as such I hold that his objection and arguments are misconceived and the case of Amina Koya v State (supra) in respect of bias referred to by the Mr. Robinson Prasad has no application to the issue of filling disclosures in view the of **Ram v State** (supra) and the nature of the proceedings before this Commission. The purpose of the hearing of the evidence at the inquiry will be to clarify and test the evidence that may have been provided prior to the hearing by the parties and their witnesses. The focus of the process will be an inquiry on the part of the Commission and not a trial of charges or issues so to speak. This view of the hearing accords with the authorities cited above and the provisions of the LPA.

20. Hence, I hold that filling of disclosures can possibly cause no prejudice or any apprehension of bias in *sui generis* disciplinary proceedings before this Commission that is not of an adversarial nature. The Respondent has failed to appreciate this subtle but important difference between criminal/civil proceedings *vis-à-vis* disciplinary inquiries before this Commission. As such I hold further that the Respondent's objection is misconceived and devoid of merit.

21. Further I hold that it is necessary and lawful to have disclosures filed by all parties and if necessary this Commission is empowered to require such or any relevant documents to be produced.

22. Towards the end of Mr. Prasad's written submission under the sub heading "Complaint" he submits matters pertaining to the main allegation that he did not have an opportunity to respond and provide a reasonable explanation as alleged. This is a litigation issue and will be considered during the inquiry proper.

23. For the above reasons, I have no alternative but to reject the argument of bias and refuse and dismiss the Respondent Practitioner's application to remove and return the disclosures from the record of this Commission. Accordingly, the application and the objection are hereby refused and rejected.

Gihan Kulatunga
COMMISSIONER