

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0058 of 2013
(Appeal from ILSC Application No. 024 of 2013)

BETWEEN : ANAND KUMAR SINGH

Appellant

AND : THE CHIEF REGISTRAR

Respondent

Coram : Prematilaka, JA
Jameel, JA
Seneviratne, JA

Counsel : Mr. R.A. Singh for the Appellant
Mr. A. Chand for the Respondent

Date of Hearing : 13 February 2018

Date of Judgment : 8 March 2018

JUDGMENT

Prematilaka, JA

- [1] I have read in draft the judgment of Jameel JA and agree with the reasons and conclusions thereof.

Jameel, JA

Introduction

- [2] This is an appeal from the judgment and the sentence imposed by the Independent Legal Services Commission (“the Commission”) dated 7 November 2013, suspending the Practicing Certificate of the Appellant for two months from the date of the judgment. The Appellant seeks to set aside and quash the charge brought against him, and the sentence of two months suspension imposed.
- [3] The issue raised in this appeal, is in respect of the onus upon legal practitioners to respond in a timely manner, to any notice received from the Chief Registrar under the Legal Practitioners Act, 2009, and the consequences that flow from non-compliance.

The first notice dated 26 June 2013

- [4] The Chief Registrar received a complaint dated 14 February 2013 from the Federated Airline Staff Association, against the Appellant, under section 99 of the Legal Practitioners Act 2009. Consequently, the Chief Registrar took action under section 105 (1) of the Legal Practitioners Act, 2009, and wrote to the Appellant by a notice dated 26 June 2013, which was received by the Appellant on 27 June 2013, annexing copies of the complaints against him and directed him to furnish an explanation to the complaint, within twenty-one days from the date of receipt

of the said notice. The date by which a written explanation was due from the Appellant, was therefore on or about 19 July 2013.

- [5] The notice contained in the letter dated 26 June 2013, *inter alia* stated as follows:

“Notice under section 104 of the Legal Practitioners
Decree 2009

Complaint by the Federated Airline Staff Association- Ref
no. 72/13

We enclose the complaint together with the documents received for your response pursuant to section 104 of the Practitioners Act 2009. As per section 105 you are granted twenty-one (21) day (sic) from the date of the receipt of this letter to furnish the Chief Registrar’s office with a response.

We wish to bring to your attention section 108 of the Legal Practitioners Act 2009”.

The Second Notice dated 29 July 2013

- [6] Since the Appellant did not furnish a written explanation to the complaint within the time specified in the notice, the Chief Registrar wrote again by letter dated 29 July 2013, enclosing a copy of his previous letter dated 26 June 2013, stating that he had not received a written explanation or response from the Appellant as required under section 105 of the Legal Practitioners Act 2009, and notified the Appellant that he was being granted a further period of fourteen days from the date of the receipt of the second notice, to furnish his written explanation. The

Chief Registrar also drew the Appellant's attention to section 108 (2) of the Legal Practitioners Act, 2009.

- [7] According to the extended time given to the Appellant, the date for submitting the response to the direction issued by the Chief Registrar, in respect of the complaint of the former client of the Appellant, was on or about 12 August 2013.

The Appellant's reply dated 9 August 2013

- [8] However, instead of furnishing a written explanation as required under section 105(1) of the Legal Practitioners Act, 2009, just before the expiry of the extended date given by the Chief Registrar, by letter dated 9 August 2013 the Appellant wrote to the Chief Registrar as follows-

"I acknowledge your letter dated 29th July 2013.

I wish to seek your indulgence in postponing my response thereto to sometime after the 6th September 2013.

The reason for the deferral is that I am suffering from ill health and will be able to attend to the response after my surgery in late August 2013.

I await your response to my request. "

- [9] The Chief Registrar did not send the Appellant a reply, nor did he have the discretion to grant an extension to the Appellant to furnish the written explanation required in respect of the complaint made against him to the Chief Registrar. When there was no response whatsoever, after the expiry of the extended deadline, disciplinary proceedings were commenced against the Appellant, before the Independent Legal Services Commission (' the Commission'), with the filing of the impugned charges against the Appellant.

Proceedings before the Commission

[10] The charge filed against the Appellant, was as follows: -

“Anand Singh a legal practitioner from 26th June 2013 till date failed to respond to a complaint lodge by Federated Airline Staff Association with the time stipulated in the notice issued by the Chief Registrar pursuant to Section 104 and 105 of the Legal Practitioners Act 2009, and thereafter failed to respond to a subsequent reminder notice dated 29th July 2013 issued by the Chief Registrar pursuant to Section 108 (10) of the Legal Practitioners Act 2009, which conduct was a contravention of Section 108(2) of the Legal Practitioners Act 2009 and was an act of professional misconduct.”

[11] Proceedings commenced before the Commission on 17 October 2013. On the first day of the proceedings, the Appellant did not appear before the Commission, on the basis that he was 'busy with clients'. He was represented by Counsel Mr. A. Nand, who informed the Commission that his client's instructions were to plead 'not guilty' to the charge, and to also not agree to the bundle of documents, at that stage. Upon being questioned by the Commissioner, Counsel for the Appellant said that he was instructed to 'pass the information to the Commissioner that he does not agree to the facts at this stage'. The reference to the word 'he' here, is to the Appellant. An examination of the record of the proceedings of the first date, reveals that there was understandable surprise on the part of the Commissioner that the Appellant was denying the truth of all the documents filed by the Chief Registrar, including the letter sent by the Appellant himself to the Chief Registrar. The proceedings of the first day ended with the date for hearing being fixed for 1 November 2013.

- [12] The Appellant appeared at the proceedings held on 1 November 2013, and was represented by new Counsel, namely, Mr. A. Ravindra Singh and Mr. M. Anthony. A plea of 'not guilty' was entered, and the Commission was informed that the Appellant was now, not disputing the documents, but intended to raise the defence of a reasonable explanation under section 108 (2) of the Legal Practitioners Act.
- [13] The Appellant called one witness, Dr. Shaheen Ahamed Nusair, whose testimony, the Commission was satisfied, established that the Appellant had been ill and undergone medical treatment and procedures both before, and after the receipt of the two notices sent to him by the Chief Chief Registrar, directing him to furnish a written explanation to the complaint against him.
- [14] The Appellant relied on his ill-health established by the medical evidence, as a reasonable explanation for failure to respond in a timely manner to the second notice dated 29 July 2013. After an examination of the evidence, the Commission found that although the medical evidence established the Appellant's ill- health during the period under review, in view of the conduct of the Appellant during that period of time, it was not impossible for the Appellant to have complied with the Chief Registrar's notices. This matter will be dealt with more fully under the fourth ground of appeal raised by the Appellant.

The First Ground of Appeal

- [15] The first ground of appeal pleaded was as follows: -

"That the Appellant breached no orders or directions as per the charge of professional misconduct under Section 83(1) (g) of the Legal Practitioners Act, 2009 and as such the charge under section 83(1) (g) was never prosecuted".

[16] The determination of this ground of appeal requires an analysis of the provisions of Part 9 of the Legal Practitioners Act. The Act covers largely two aspects of discipline, viz:

- (a) professional standards to be maintained in respect of competence and diligence that the public are entitled to expect from a legal practitioner, a law firm or an employee or agent of a law firm; and
- (b) the conduct of a legal practitioner, a law firm or an employee or agent of a law firm occurring otherwise than in connection with the practice of the law, that would justify a finding that he is not a fit and proper person to engage in legal practice.

[17] Part 9 of the Legal Practitioners Act is titled 'Professional Standards'. Division 1 sets out the definitions of 'Unsatisfactory Professional Conduct' and 'Professional Misconduct'. What is relevant for this appeal is section 83(1) (g), which provides as follows: -

"Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

83.— (1) Without limiting sections 81 and 82, the following conduct is capable of being "unsatisfactory professional conduct" or "professional misconduct" for the purposes of this Act:

(g) conduct of a legal practitioner or law firm in failing to comply with any orders or directions of the Chief Registrar or the Commission under this Act;"

[18] Division 3 of the Act is titled '*Complaints and Investigations*'.

Section 99

[19] Section 99, contained in Division 3, provides the mechanism for a complaint to be made to the Chief Registrar, and provides as follows:

"99. — (1) Any person or entity may make a complaint to the Chief Registrar regarding any alleged professional misconduct or unsatisfactory professional conduct by any practitioner or law firm, or any employee or agent of any practitioner or any law firm."

[20] Section 104 provides for the Chief Registrar to inform the practitioner against whom a complaint has been made, and provides as follows: -

"Practitioner or law firm to be informed

"104. Upon receipt of a complaint under section 99 or commencement of an investigation under section 100, the Chief Registrar shall refer the substance of the complaint or the investigation—

(a) in the case of complaint or investigation against a legal practitioner—to the legal practitioner;

(b) in the case of complaint or investigation against a law firm—to all the partners of the law firm; or

(c) in the case of complaint or investigation against any employee or agent of a legal practitioner or law firm—to the legal practitioner or the one or more partners of the law firm."

Section 105

- [21] Section 105 empowers the Chief Registrar to call for an explanation from the practitioner, either flowing from a complaint under section 99, or on the basis of an investigation launched by the Chief Registrar, independent of a complaint. Section 105 provides as follows: -

“Chief Registrar may require explanation

105.— (1) Upon receipt of a complaint under section 99 or commencement of an investigation under section 100, the Chief Registrar may require that the legal practitioner or the law firm by written notice to furnish to the Chief Registrar within the time specified in that notice a sufficient referred to in the complaint.

(2) The Chief Registrar may by notice in writing require a legal practitioner or law firm to provide to the Chief Registrar a sufficient and satisfactory explanation of any matter relating to that practitioner's or that law firm's conduct or practice. Such explanation shall be provided in writing to the Chief Registrar within the time specified in the notice.”

Section 108

- [22] This specifies the consequences of the failure to provide the written explanation called for in the notice sent by the Chief Registrar under section 105.

- [23] Section 108 provides as follows:

“Failure to provide explanation or production of documents etc.

108. (1) Where any legal practitioner or law firm fails to comply with any notice issued under section 105 or section 106, the Chief Registrar may notify the legal practitioner or law firm in writing that if such failure continues for a period of fourteen days from the date of receipt of such notice, the legal practitioner or law firm will be liable to be dealt with for professional misconduct.

(2) If such failure referred to in subsection (1) continues for a period of fourteen days from the date of such notification to the practitioner, such failure shall be deemed to be professional misconduct, unless the legal practitioner or law firm furnishes a reasonable explanation for such failure. In any proceedings before the Commission, the tendering of a communication or requirement from the Chief Registrar with which the legal practitioner or law firm has failed to comply, together with proof of service of such communication or requirement, shall be prima facie evidence of the truth of the matters contained in such communication and any enclosures or annexures accompanying such communication.” (Emphasis added).

- [24] It is convenient to examine in sequence, each of the provisions set out above, in order to understand the scheme of the Act, and the provisions relating to Professional Standards.

- [25] Section 100 empowers the Chief Registrar to investigate a practitioner even in instances in which there is no complaint, but he has reason to believe that unsatisfactory conduct warrants investigation.
- [26] Under section 104, upon the receipt of a complaint, or the commencement of an investigation against a legal practitioner, in the first instance, requires the Chief Registrar to notice the practitioner in writing, together with the substance of the complaint against him and call for a written explanation.
- [27] Once a complaint is received, and the Chief Registrar notifies the practitioner and issues a direction calling upon the practitioner to furnish a written explanation, it becomes mandatory for the practitioner to respond, in writing. The written explanation must be in respect of the substantial complaint made by a member of the public under section 99, and referred to the practitioner by the Chief Registrar, in the notice issued under section 104.

The discretionary 'warning'

- [28] When a practitioner fails to respond to the notice directing and requiring a satisfactory written explanation to the substance of the complaint against the practitioner, within the time specified by the Chief Registrar in the notice, section 108(1) gives the Chief Registrar a discretion to notify the practitioner that if the failure continues for a period of fourteen days from the date of such notification, (that is, the second notification), to the practitioner, such failure shall be *deemed* to be professional misconduct, unless the practitioner furnishes a reasonable explanation for such failure. The reference here to date of notification, must be interpreted to mean the date of the receipt of such notice by the practitioner. Thus, if the Chief Registrar chooses to exercise the discretion given to him under section 108(2), another fourteen days will automatically be added to the original number of days given under section 105(1), to respond to the original complaint made against him.

- [29] Section 108(1) is in effect a provision which gives discretion to the Chief Registrar to warn the practitioner and put him on notice of the impending possibility, that his failure to provide a satisfactory written explanation to the main complaint, would render him liable *to be dealt with* for professional misconduct, (emphasis added).
- [30] If a practitioner complies with the first notice issued by the Chief Registrar under section 105(1), the Chief Registrar will forward such written explanation to the complainant, for his response. The complainant may either seek to pursue his complaint, or the matter may terminate, if the complainant is satisfied with the explanation given by the practitioner.

The commission of the offence by operation of law

- [31] If even during the extended period of fourteen days given under section 108(1) the practitioner fails to provide a satisfactory written explanation to the Chief Registrar, then, at the end of that extended fourteen-day period, such failure shall be deemed to be professional misconduct unless the practitioner furnishes a reasonable explanation for such failure. The word 'such' refers to the explanation required in respect of the original complaint made against him and notified to him by the Chief Registrar under section 105(1). Thus, professional misconduct is, by operation of law, established by the failure to comply with the notice of the Chief Registrar, and the provisions of section 108(2) will be engaged.
- [32] Section 108(2) which is required to be considered in this case, is a mandatory provision, and imposes strict liability, through a deeming provision. Therefore, liability attaches by operation of law, and the offence is considered to have been committed *ipso facto*, upon the failure of the practitioner to respond within the extended period given under section 108((2).

- [33] When the Chief Registrar under section 105(1) ‘requires’ a practitioner to provide a written explanation to a complaint received by him from a member of the public, it amounts to a direction. There is no impediment to the Chief Registrar, when acting under section 105(1), stating that the practitioner is ‘directed’ to furnish a written explanation. Merely because in the first notice issued by the Chief Registrar dated 26 June 2013 he has not used the word ‘order’ or ‘direct’, it does not mean that it was not a direction. This is the only reasonable interpretation possible, if not, the word “require” in section 105(1), would be rendered meaningless. Accordingly, the notice sent by the Chief Registrar under section 105(1) is a notice containing a direction or order, to the practitioner to furnish a written explanation. Thus, in my view, the charge against the Appellant was properly framed, and the failure to comply with the direction issued under section 105, amounts to professional misconduct in terms of section 83(1) (g) of the Legal Practitioners Act 2009.

The consequences of breach of section 108(2)

- [34] When a charge is filed alleging violation of section 108(2), the matter in issue does not relate to the merits of the original complaint made by a member of the public against the practitioner. The prosecution of the charge before the Commission then is in respect of the failure or omission to comply with an order or direction given by the Chief Registrar, within the time specified by him in the notice. However, I also observe that under the second limb of section 108(2), if the practitioner fails to respond to a communication or requirement, of the Chief Registrar when proved to have been served, it shall be *prima facie* evidence of the truth of the matters contained in such communication and any annexures or enclosures accompanying such communication.

[35] Thus, when the Appellant failed to comply with a direction of the Chief Registrar as notified in the letter dated 26 June 2013, he committed an offence of professional misconduct, and the charge against the Appellant was therefore valid in law. The first ground of appeal is therefore dismissed.

The Second Ground of Appeal

[36] The second ground of appeal was pleaded as follows:

"That the Appellant was denied natural justice when the allegations against him were not fully supported by evidence in the depositions before the ILSC;"

[37] This ground of appeal has no basis because the facts of this case reveal otherwise. A denial of natural justice can be said to occur when the person against whom a charge is brought is denied the right to effectively defend himself against the charge. This could happen in a variety of ways such as not being given notice of the content of the charge to be defended, or being denied the right of legal representation, or the right to cross examination, or in some other way in which the process of arriving at an adverse finding is unfair and in breach of the basic tenets of fairness. This ground of appeal raised by the Appellant is baseless and misconceived because the 'allegation' against the Appellant was specified in the charge, it was a case of strict liability. There was no doubt about the fact that the Appellant had failed to furnish a written explanation to the complaint received against him by the Chief Registrar, the contents of which was made known to the Appellant, and he was before the Commission for the very purpose of defending the charge against him. Therefore, the second ground of appeal is dismissed.

The Third Ground of Appeal

[38] The third ground of appeal was pleaded as follows:

“That the Commissioner erred in law and in fact in hearing or continuing to hear the matter further and making a determination when facts were borne out which connected him as a witness;”

[39] This ground of appeal is misconceived because the Commissioner was not a witness. As I understand this ground of appeal, the Appellant claims that the Commissioner was biased. Counsel for the Appellant did not press this point during the course of the hearing, and this is also reflected in the fact that submissions on this point were confined to two brief paragraphs in the Appellant’s Written Submissions.

[40] However, since it has been pleaded as a ground of appeal, I am prepared to consider it. The allegation and basis of this ground of appeal is that the evidence revealed that the Appellant had appeared in the High Court when the Learned Commissioner was presiding as a Judge of that court. Firstly, the appearances of the Appellant in various courts including the High Court presided over by the learned Commissioner, was evidence to demonstrate that the Appellant had made appearances in court in the context of his defence that it was his ill -health that stood in the way of his furnishing a timely response to the Chief Registrar. Secondly, the learned Commissioner need not have been ‘called as a witness’, because court appearances are a matter of public record, and the Registry is in possession of information in respect of appearances of practitioners. The fact that the learned Commissioner recollected that the Appellant had appeared before him during the relevant period the Appellant claimed he was unwell and was medically advised to refrain from court appearances, does not render the Learned Commissioner a witness, a potential witness, or even indicate prejudice against the Petitioner or bias on his part. In any event, an allegation of bias or

disqualification on the part of a decision-maker must be taken at the earliest possible opportunity. The proceedings in this case reveal that the Appellant's Counsel did not make any application or submissions to that effect. It has been taken up for the first time only in appeal.

- [41] A decision maker can be presumed to be biased, if he has a direct interest in the outcome, because no man can be a Judge in his own cause. What 'cause' the learned Commissioner was pursuing in this case was not specified by the Appellant. It appears that the allegation in this case is not directly one of actual bias, but a complaint that alludes to an allegation of bias. It is therefore not well-founded and is rejected.

What is the test for bias?

- [42] The fact that the learned Commissioner in this case had dual roles, is a matter that requires attention. In certain situations, necessity must give way to the legislative intention to permit one person to function in dual capacities. In Re. S (A Barrister) [1981] 1 QB 41 it was held that a solicitor may sit as a magistrate on a prosecution brought by the Council of the Law Society; in R v Deal Justices (1881) 45 LT 439 it was held that a member of a society for preventing cruelty to animals may adjudicate on a prosecution brought by the society.
- [43] In Brosseau v Alberta (Securities Commission), (1989) 1 SCR 301, a decision of the Alberta Court of Appeal, the Appellant alleged that a reasonable apprehension of bias arose by the fact that the Chairman of the Commission, who had received an initial investigative report, was also designated to sit on the panel at the hearing of the matter.
- [44] Dubin JA however found that when the structure of the Act itself, reveals that commissioners could be involved in both the investigatory and adjudicatory

functions that did not, by itself, give rise to a reasonable apprehension of bias. At pp. 140-41 he said:

“Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.”

[45] L Heureux – Dube J said:

“Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se. In this case, the appellant complains that the Chairman was

both the investigator and adjudicator and that therefore, the hearing should be prevented from continuing on the grounds of reasonable apprehension of bias”.

[46] Statements or views expressed by the decision -maker will not by itself give rise to the appearance of bias, unless the conduct and language used indicate clearly that he had made up his mind and arrived at a final decision. In an inquisitorial disciplinary inquiry such as one before the Commission, there is likely to be previous knowledge of the conduct of the practitioner under inquiry. However, in the absence of actual bias, and a clear indication of finality, the allegation remains unsustainable and must be rejected.

[47] Drawing from that Judgment, I now consider sections 85 (1) and (2) of the Legal Practitioners Act which provide that:

“(1) The Commissioner shall be appointed by the President on the advice of the Attorney General.

(2) The Commissioner must be a person qualified to be a judge under section 15 of the Administration of Justice Act 2009”.

[48] In determining this issue, it is relevant to consider what matters the learned Commissioner would have had to consider in this case. The discomfort felt by the Appellant was probably because the Appellant had appeared in court, including before the High Court presided over by the Commissioner, during the period his explanation was due to the Chief Registrar. In other words, whilst the Appellant had not paid any attention to the notice issued by the Chief Registrar, the Appellant was making several court appearances. From a reasonable point of view, this conduct naturally would dilute the Appellant’s defence that it was ill -

health that was an impediment in the way of his furnishing a timely response. In any event, in this case, when questioned, the Appellant himself admitted the court appearances, and sought to justify them on various grounds, which are not relevant to the determination of this ground of appeal. The Commissioner's knowledge of such appearances does not automatically disqualify the Commissioner, in the absence of a valid ground for the allegation.

- [49] In view of the fact that under the Legal Practitioners Act 2009, a High Court Judge may hold the position of Commissioner of the Independent Legal Services Commission, there is always the possibility that matters that transpire before the Commissioner in his capacity as a Judge, may surface in the proceedings of the Commission, and the open acknowledgment of such matters cannot, *per se* be the basis of an allegation of prejudice or bias. In my view, the facts of this case do not raise a reasonable apprehension of bias, nor can they undermine public confidence in the impartiality of the Commission. I would therefore dismiss the third ground of appeal.

The Fourth Ground of Appeal

- [50] The fourth ground of appeal was pleaded as follows:

"That the Commissioner erred in law and in fact in finding the Appellant guilty of professional misconduct when the Appellant had a reasonable excuse for his circumstances, and which was accepted by the ILSC;"

The failure to comply with directions under section 108(1)

- [51] The evidence of Dr. Nusair, who testified on behalf of the Appellant, was accepted by the Commission without reservation. However, the determination of this ground of appeal requires an analysis of the substance of the evidence,

specifically in respect of the dates of treatment and the medical advice given, in order to determine whether the Appellant's defence of ill-health was a reasonable ground which precluded him from furnishing a timely written explanation to the Chief Registrar, as mandated by law.

- [52] Dr. Nusair stated that the Appellant was admitted to hospital on 6 June 2013, having suffered a heart attack, and was hospitalized between 6th and 14th June 2013. He was also suffering from diabetes, obesity, hypertension, kidney disease, having high cholesterol. Since his arteries were blocked, 'by-pass' surgery was recommended, which the Appellant had opted to do in Auckland. The surgery had been done in Auckland and he returned to Fiji by 29 August 2013. According to Dr. Nusair, the Appellant 'had no problems until 23rd of September', on which date he was presented once more, with a complaint of more chest pain, and spent one night in hospital. At this point, the Appellant was advised to undergo an angiogram. This was not available in Fiji, at the time, and could be done only by doctors who were due to visit Fiji in mid-November 2013.
- [53] The effect of Dr. Nusair's evidence then is that between 29 August 2013 and 23 September 2013, the Appellant was in a position to attend to at least some of his work. I consider it significant that even during this period of time, that is, after the expiry of the extended deadline, and after returning to Fiji having undergone surgery, and having also appeared in court on 13 and 16 September 2013, and prior to charges being filed against him, the Appellant failed to furnish the Chief Registrar with a written explanation. Therefore, in these circumstances, the medical evidence alone does not amount to a reasonable explanation for the failure to respond to the direction of the Chief Registrar.
- [54] In regard to whether the evidence of Dr. Nusair reflected or amounted to a reasonable explanation for failure to respond to the directions issued under section 108(1) would depend on the conduct of the Appellant after the receipt of both, the

first notice dated 26 June 2013 and the second notice granting an extension of time, dated 29 July 2013.

- [55] The first notice dated 26 June 2013 was faxed to the Appellant on 27 June 2013 and received in the Appellant's office on 27 June 2013. This was 13 days after the Appellant had been discharged from hospital after a heart attack.
- [56] It was not disputed that information in respect of the court appearances made by the Appellant transpired before the Commission through admissions made by the Appellant and his Counsel, which was within the knowledge of the Commissioner, who also happened to be the Judge in the High Court before whom the Appellant had appeared during the period the Appellant was required to furnish the written explanation to the Chief Registrar.
- [57] According to the Appellant, when he was discharged from hospital on 14 June 2013, he was given strict instructions not to attend office, and he had briefed out the majority of his cases to other Counsel but was unable to brief out all of them. The Appellant admitted that he appeared in the Court of Appeal on 28 June 2013, and that he sought the indulgence of the court to be excused from appearing due to his illness.
- [58] In cross-examination the Appellant admitted (RHC Vol.2, p. 238) that in the month of July he may have appeared in court, but that he went to his office only for an hour or two every week. The testimony of Dr. Nusair established that for six weeks after the heart attack, the medical advice was to not go back to work. The Appellant suffered a heart attack on 6 June 2013, and six weeks would therefore end on 18 July 2013. The learned Commissioner took cognisance of the fact that the Appellant had appeared in the High Court on 9 July 2013. This was not denied. Thus, the fact remains that even during the period that the Appellant was ordered to rest, he took it upon himself to make court appearances, and failed to respond to the directions of the Chief Registrar.

[59] Although the evidence established that the Appellant was not completely free of the need for medical treatment during the period commencing with the issue of the first notice, and the commencement of the proceedings before the Commission, there was no evidence to establish that it was practically or administratively impossible for the Appellant to have made arrangements for at least his office to have initiated taking steps for the purpose of furnishing an explanation to the Chief Registrar. There was no evidence that there was any particular difficulty in locating the file relating to the complaint made by a former client and a copy of which was referred to the Appellant by the Chief Registrar in the first notice. The Appellant did not show any remorse or regret the failure, to furnish a written explanation. It was admitted that the first notice was received in the Appellant's office on 27 June 2013, and that on 28 June 2013, the day after the notice was received, he did appear in court.

[60] The Appellant made court appearances on 14 and 22 August and on 13 and 18 September and 16 and 18 October, 2013.

Was the Appellant's failure to respond explained reasonably?

[61] The period between 29 August 2013 and 23 September 2013, was also considered as being a period which could be termed 'out-of' danger'.

[62] Therefore, the Commissioner was correct in finding that the Appellant gave priority to his court appearances, to the total exclusion of not just one, but two notifications and directions by the Chief Registrar, who is statutorily bound to effectively regulate the professional conduct of legal practitioners. The judgment of the Commission must be considered in the context of the legislative intention to impose strict liability for failure to respond to the directions of the Chief Registrar in a timely manner, thus in effect obstructing his duty to regulate effectively. Thus, I find that the Commission was correct in finding that the

Appellant's failure to comply with the Chief Registrar's directions was not reasonably explained.

The Chief Registrar's failure to respond to the Appellants letter dated 9 August 2013

- [63] The Appellant's letter dated 9 August 2013, was written just three days before the expiry of the extended time given by the Chief Registrar to furnish a written explanation to the original complaint. The reality is that at the end of the extended fourteen-day period given under section 108(1), the Chief Registrar has no discretion to extend the deadline, and the practitioner is deemed to be in default, which is capable of amounting to unsatisfactory professional conduct or professional misconduct under section 83(1) (g) of the Legal Practitioners Act 2009, *unless* a reasonable explanation is furnished by the practitioner. As to what is reasonable will depend on all the circumstances, and the practitioner's sense of responsibility to his professional duties, as reflected by his conduct in respect of the notice sent to him by the Chief Registrar.
- [64] Although the Chief Registrar has no discretion to extend the time given in section 108(1), it is likely and indeed probable, that had the Appellant taken steps to furnish an explanation to the substantial complaint between 29 July and 1 November 2013, (after his return from Auckland and the commencement of proceedings before the Commission), there would have been no need to frame a charge and initiate proceedings before the Commission. However, as at the date proceedings commenced on 1 November 2013, the Appellant had not furnished an explanation to the substantial complaint.
- [65] The Commission found that the duty to respond to the Chief Registrar's request was an on-going duty, and that the Appellant made several appearances during the period his explanation was required, but he made no effort to comply with the Chief Registrar's request, knowing that it was incumbent on him to do so. Whilst it is not for the Commissioner to determine the merits of the Appellant's

priorities, the admitted court appearances to the exclusion of fulfilling other professional responsibilities which were equally important, militates against the drawing of any conclusion beneficial or favourable to the Appellant. The totality of the conduct of the Appellant, taken in conjunction with the medical evidence did not establish that the Appellant had a reasonable explanation for his failure to comply with the notice under section 108(1). Accordingly, I see no reason to interfere with the findings of the Commission, and for the reasons set out above, I dismiss the fourth ground of appeal.

The Fifth Ground of Appeal

[66] The fifth ground of appeal was pleaded as follows:

“That the Commissioner erred in law in imposing a penalty without giving the Appellant an opportunity to plead in mitigation prior to sentence;”

[67] The opportunity to mitigate was not denied to the Appellant, in the manner articulated by the Appellant’s Counsel, for the reasons that will be set out below.

[68] On 13 November 2013 at the conclusion of proceedings, the learned Commissioner informed the parties that both sides had made good submissions, he had not made up his mind on the matter but would look carefully at the submissions. He then informed the Appellants’ Counsel that as a matter of convenience to Counsel, in order to avoid Counsel having to come back again, he could address the Commission in respect of mitigation of penalty at that point itself if he so wished to. However, the Appellant’s Counsel did not wish to make submissions at that stage and informed the Commission that if a finding was made against the practitioner he would, at that stage, appear in person and make submissions in respect of the plea in mitigation. The impression I get is that there was hesitation to make submissions in mitigation of sentence at the point it was first suggested by the learned Commissioner. The learned Commissioner then

informed the Appellant's Counsel that he had not made up his mind in regard to the matter, but that if a finding is made against the Appellant, the Appellant's Counsel would be told when the judgment is going to be handed down. It appears that the Judgement was delivered without the Appellant's Counsel being informed prior to the delivery of the judgment.

- [69] Failure to make use of an opportunity given, and being denied an opportunity are two distinct matters. It was the former that happened in this case. In fact, when first asked, it was the Appellant's Counsel who opted to postpone making submissions on the plea in mitigation. On the contrary, it was the learned Commissioner himself who first drew the attention of the Appellant's Counsel to the need to plead in mitigation, and specifically asked him to tell him what an appropriate penalty would be. If on the other hand the Appellant's Counsel had requested the opportunity to make submissions in mitigation, and the learned Commissioner had refused on the basis that he would inform and invite the Counsel to make submissions later, there may have been some merit in this ground of appeal. In these circumstances, it cannot be contended that the Appellant's Counsel was not given the opportunity to plead in mitigation, as alleged. and I therefore dismiss the fifth ground of appeal.

The Sixth Ground of Appeal

- [70] The sixth ground of appeal was pleaded as follows:

"The sentence, as imposed on the Appellant is harsh, unjust and unfair in the circumstances of the case".

- [71] The purpose of imposing strict liability is that the offence is regarded as so serious that it sufficient that non-compliance by itself creates the offence, and the burden then shifts to the practitioner to furnish a reasonable explanation. As observed by me earlier, even at the time the proceedings were commenced, the Appellant had

not furnished the explanation called for by the Chief Registrar. Therefore, there was no indication of an effort to comply with the direction of the Chief Registrar. In such a situation, the question arises as to what would be the most appropriate to be the disciplinary measure to be imposed on the practitioner.

[72] The sentence imposed on 7 November 2013, in respect of the Appellant was not outside the range of sentences imposed by the Commission in other cases that were determined at the time.

[73] In Chief Chief Registrar v Luseyane Ligabalavu (ILSC Application No. 003 and 004 of 2012), in respect of a breach of section 108(2), and failure to comply with a mediation order, the practitioner's Practicing Certificate was suspended for a period of four months and one week.

In Chief Chief Registrar v John Rabuku (ILSC Application No. 13 of 2013), for a breach of section 108(2), the practitioner was publicly reprimanded and his Practicing Certificate was suspended for a period of three months from the date of the judgment, and he was fined a sum of \$500.00.

In Chief Chief Registrar v Susil Chand Sharma (ILSC Application No. 14 of 2013), the practitioner was publicly reprimanded and his Practising Certificate was suspended for a period of one month from the date of the judgment, and he was fined a sum of \$500.00

[74] In Abay Kumar Singh v Chief Chief Registrar (Civil Appeal NO. CBV 0007 of 2010) the Supreme Court (Marsoof J, Hettige J and Calanchini J) said:

"It is to be noted that in a disciplinary proceeding against a solicitor with a charge of unprofessional conduct the court acts in the public interest and not to punish the solicitor. This position has been recognised in a series of

cases in several jurisdictions. In the case of Legal Practitioners Conduct Board v Murphy (1999) SASC 83 the court observed that 'the court is concerned to protect the public, not to punish a solicitor who has done wrong, although of course the removal of the Petitioner's name from the Roll will operate as a punishment. The court acts to protect the public and the administration of justice by preventing a person from acting as a legal practitioner'.

- [75] Although the intention of disciplinary procedure is to protect the public and not to punish the practitioner, in my view, as to what sentence would best serve the public interest must be considered carefully, on a case by case basis. It ought to not be presumed that suspension from the Roll does not serve the public interest and only results in punishment of the 'practitioner'. Suspension may punish the practitioner, but it may also serve the public interest. On the other hand, a fine alone, may not be sufficiently deterrent, and may therefore defeat the purpose of regulation. Therefore, unless the order made by the Commission results in the legal profession becoming aware that professional misconduct has serious consequences, the purpose of the Disciplinary Proceedings will be rendered nugatory. The consumers of legal services are the public. Public confidence in the legal protection can be maintained only when the public feel assured that the regulatory regime is effective.
- [76] I have given anxious consideration to the authorities relied on by the Appellant's Counsel. Although at first blush they appear relevant, to the Appellant's case, a close analysis reveals that they do not apply in a manner that compels me to vary the order of the Commission. I also note that they are Judgements handed down after the impugned Judgement of the Commission, although that is not the reason that I find them inapplicable to the facts of this case.

[77] To a practitioner, reputation must mean everything. Any act which reflects a cavalier attitude to a client, whether present or former, and which is reflected in the failure to respond to the regulator, ought not to be excused. The intention of the legislature as reflected in the Legal Practitioners Act, 2009, is that disciplinary proceedings are to ensure the protection of the public, through a rigorous system of regulation. Unless regulation is also deterrent in effect, in the final analysis, there is no guarantee that the system of regulation will bring about the desired results. Thus, because the protection of the public is paramount, in my view, the sentence imposed on a practitioner must give the public the confidence that the system is effectively regulated and that disregard of professional responsibility, in any form, and to anyone, will not to be condoned.

[78] In my view, in all the circumstances of the case, the sentence imposed by the Commission is not excessive, or disproportionate to the gravity of the offence, or based on any irrelevant considerations or upon a wrong principle. Therefore, I see no reason to vary the sentence imposed by the Commission, and dismiss the sixth ground of appeal.

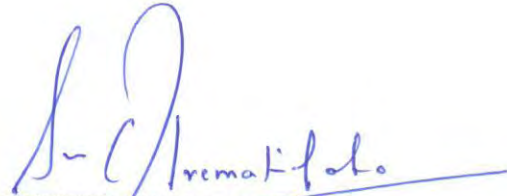
Seneviratne JA:

[79] I agree with the reasoning and findings of Jameel JA.


The Orders of the Court are:

- 1. The appeal of the Appellant is dismissed, and the Judgment of the Independent Legal Services Commission dated 7 November 2013 is affirmed.*

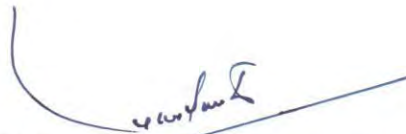
2. *The Appellant will pay to the Respondent a sum of \$3,500.00 as costs of the Appeal.*



.....
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



.....
Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL



.....
Hon. Mr. Justice L. Seneviratne
JUSTICE OF APPEAL