

**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**AT SUVA**

**CIVIL APPEAL NO. ABU 3 OF 2010**

**BETWEEN** : **ABHAY KUMAR SINGH**

**APPELLANT**

**A N D:** **CHIEF REGISTRAR**

**RESPONDENT**

**Coram:** **Byrne, Acting President**  
**Calanchini, JA**

**Date of Hearing** : **25 March, 31 March, 1 April, 12 April and 22 April**  
**2010**

**Date of Decision** : **7<sup>th</sup> May 2010**

**Counsel** : **Appellant in person**  
**Ms V Lidise for Respondent**

**DECISION**

[1] We have before us two applications by the Appellant. In chronological order, the first application was filed by the Appellant on 1 February 2010. In that application the Appellant applied for an order that the decision of the Commissioner of the Independent Legal Services Commission (the Commissioner's decision) be stayed pending the determination of the Appellant's appeal.

[2] The second application was by way of an amended Summons filed on 31 March 2010. In the second application, the Appellant applied for an additional order that the decision of the Chief Registrar dated 26 January 2010 striking the name of the Appellant from the Roll of the High Court be rescinded.

[3] This second application was filed with the leave of the Court which was given as a result of a disclosure by Counsel for the Respondent on the day when our decision on the stay application was to be delivered. We were informed that a favourable decision on the Appellant's stay application may be rendered nugatory on account of the action of the Chief Registrar who had ruled a line through the name of the Appellant thereby removing his name from the Roll of Legal Practitioners. This had been done, so we were informed, on 26 January 2010.

[4] This was confirmed in a letter dated 17 February 2010 from the Respondent addressed to the Appellant which stated:

***"Your Practising Certificate is hereby cancelled.***

***This is consequent to your name being struck off the Roll of Barristers and Solicitors, High Court of Fiji.***

***Please have this Certificate returned to the Office of the Chief Registrar by 3p.m. today 17.02.2010."***

[5] As a matter of logic we shall consider the second application before moving on to the question of stay.

[6] The orders made by the Commissioner at the conclusion of his written Judgment dated 25 January 2010 included an order that the name of Abhay Kumar Singh be struck from the Roll.

- [7] Immediately after the decision had been delivered, the Appellant made an application for a stay of the decision pending the appeal to the Fiji Court of Appeal. The stay application was listed by the Commissioner for hearing before him at 9.00a.m. on 26 January 2010.
- [8] When the application came before the Commissioner on 26 January 2010 the hearing was stood down to enable the Appellant to file his Notice of Appeal with the Court of Appeal Registry. Upon being satisfied that the Appellant had filed his Notice of Appeal, the Commissioner proceeded to deal with the stay application in accordance with Rules 26 and 34 of the Court of Appeal Rules. The Commissioner's Practice Direction No. 1 of 2009 is to the effect that an appeal under section 128 of the Legal Practitioners Decree 2009 is to be treated in the same way as if it were an appeal from the decision of the High Court.
- [9] In a written decision dated 1 February 2010 the Commissioner refused the application for a stay of his decision that the name of the Appellant be struck off the roll (Order No. 1).
- [10] It would appear that in the meantime on 26 January 2010 the Respondent had proceeded to execute the Commissioner's Order by placing a line through the Appellant's name thereby removing him from the Roll.
- [11] It would also appear from the Record that the application for a stay was made orally before the Commissioner by the Appellant. As the Appellant acknowledged before us there was no application made by him on 25 January 2010 in the form of interim relief pending the outcome of the stay application. There was therefore no direction in place preventing the Chief Registrar from proceeding to execute the Commissioner's Order. As the Chief Justice noted in **Nivis Motors and Machinery Company Limited – v- Attorney-General** (unreported Supreme Court Civil Appeal No. 7 of 2006, 13 March 2007) at page 4:

***".... There was no coercive order commanding restraint on exercising rights following lawful acquisition. However a greater delicacy towards the court process could have been shown by the Respondent and the lack of it exhibited here is to be regretted."***

[12] Certainly the Appellant had made clear his intention to appeal at an early stage. His Notice of Appeal had been filed on 26 January 2010 and the hearing of his stay application had commenced on the same day. On the same day and with admirable haste the Respondent had executed the order of the Commissioner.

[13] The Appellant submits that this Court should order that the Respondent rescind her decision to put a line through his name and thereby permit him to proceed with his application for a stay. Apart from the promptness of his actions following the Commissioner's Judgment, the Appellant submits that the length of his legal professional career with only one serious blemish is a factor that counts in his favour. He also states that if he can make an application for stay and if that application were successful he would be able to finalise work on the 90 or so files that are pending in his office.

[14] The application was opposed by the Respondent on a number of grounds. First, the Respondent claimed that this Court did not have jurisdiction to hear the application. The Respondent also submitted that the Appellant was in the wrong jurisdiction and that the application should have been made in the High Court either by way of an application for Judicial Review or by way of appeal under section 46 of the Decree.

[15] It was submitted that this Court has no jurisdiction to hear this application.

[16] The Respondent submitted that the decision the subject matter of the present application is not a decision of the Commissioner. The Appellant has filed an appeal against the Commissioner's decision and is seeking a stay of that decision pending appeal. However the actions of the Chief

Registrar, it is submitted, are not the subject of the present appeal. It is submitted that the Respondent's act of striking the name of the Appellant off the Roll by drawing a line through his name is not being challenged on appeal.

[17] We do not agree with this submission. This Court has a statutory right to entertain an application for a stay. The present application relates to action taken by the Respondent in response to and in confirmation of the Commissioner's decision. It is an application that is connected with and is incidental to the application for a stay. We consider that section 13 of the Court of Appeal Act Cap 12 provides the statutory basis for this conclusion.

[18] It was argued before us that the Chief Registrar was exercising an administrative function under the Decree and that as a result the appropriate method of challenging that decision was by way of judicial review. In one sense the Respondent exercised a discretion in that it was necessary for her to decide when the Orders made by the Commissioner would be carried out or executed. It was submitted that the exercise of that discretion by the Respondent in giving effect on 26 January to the Commissioner's order made on 25 January 2010 could only be challenged by the Appellant by way of an application for Judicial Review.

[19] There is no doubt that an application for judicial review could result in considerable delay in determining the Appellant's application for a stay as it would be some time before the Judicial Review could be finalised by a Judge of the High Court. However we do not consider that this is a case where the Respondent has made a decision of the type that is subject to an application for Judicial Review. It was accepted before us that the Commissioner's Order had been filed in the High Court pursuant to section 122 (2) of the Decree. Upon filing, the Commissioner's Order becomes an order of the High Court. As a result we consider that that the Respondent's action constituted no more than a confirmation of the Commissioner's decision that the Appellant's name be struck off the Roll and is therefore

not itself subject to judicial review. (See *R v Secretary of State for the Home Department ex parte Kaygusuz (Ibrahim)* [1991] Imm. A.R. 300).

[20] It was also submitted that the Appellant's remedy was by way of appeal to the High Court under section 46 of the Decree. However that right of appeal would appear to be limited to decisions and/or actions taken by the Respondent pursuant to section 44 of the Decree. The present application seeks to have the line drawn through the Appellant's name on the Roll removed. As such it is not one of the matters that are listed in section 44. The right of appeal given by section 46 is not available to the Appellant in respect of the application that is presently before this Court.

[21] Secondly, the Respondent opposed the application on the basis of the risk to the public. Whilst we accept that the protection of the public and hence the public interest is always to be given significant weight, we also consider that each case must turn on its specific facts. The Appellant is asking this court for an order that the line drawn through his name be removed so that we can consider his application for a stay of the Commissioner's decision. He is asking for both orders so that he can finalise the 90 or so existing files in his office. We consider that the risk to the public under those circumstances does not outweigh what is just and reasonable under the circumstances. We have concluded that in the interest of fairness to both the Appellant and his existing clients, the public interest would be better served by permitting the Appellant to finalise his existing files.

[22] Finally the Respondent submitted that even if the Court were to grant both this application and a stay of the Commissioner's decision, the Appellant would still be required to apply for a practising certificate. We accept that to be the correct position. However we also would expect that the Respondent would respect and take note of the decisions and the reasons of this Court.

- [23] For the above reasons we propose to grant the Appellant's first application and direct that the line drawn through the Appellant's name be withdrawn and as a result his name remain on the Roll until further order.
- [24] We now move on to the application for a stay of the Commissioner's decision.
- [25] The Legal Practitioner's Decree of 2009 came into force on the 22<sup>nd</sup> of May 2009. Its broad purpose is to regulate the legal profession in the practice of its members and for the legal education of persons wishing to be admitted to practice as Legal Practitioners in the Fiji Islands.
- [26] The Decree contains 148 Sections and a Schedule under Section 129 (8) sets out Rules of Professional Conduct and Practice.
- [27] Part 9 of the Decree deals with professional standards and these are contained in Sections 81 to 130.
- [28] Section 111 deals with the commencement of disciplinary proceedings by the Registrar of the Commission who is the Chief Registrar of the High Court.
- [29] The Appellant was at all relevant times a Barrister and Solicitor of the High Court practising at Nausori, having initially been admitted to practice in New Zealand in 1994 and who returned to Fiji in 1996. He holds a Bachelor of Laws degree from Waikato University in New Zealand and a Master of Laws degree in Commercial Law from the University of Queensland, yet to complete the Advanced Masters of Law degree specializing in Commercial Fraud and the Law of Evidence.

- [30] On the 15<sup>th</sup> of October 2009 the respondent filed four complaints against the appellant in the Commission under Section 111(1) of the Legal Practitioners Decree 2009 alleging that he was guilty of professional misconduct and unsatisfactory professional conduct.
- [31] Of the four complaints the first was a charge of unsatisfactory professional conduct or professional misconduct for breaching Section 83 (1)(d)(ii) in that on the 25<sup>th</sup> of October 2006 he was convicted in the High Court of Fiji of the Criminal Offence of **attempting to pervert the course of justice** contrary to Section 131(d) of the Penal Code, Cap 17. The conviction was recorded by the present Chief Justice, then Mr. Justice Gates of the High Court, and the appellant was sentenced to 12 months imprisonment.
- [32] The appellant appealed this sentence to the Court of Appeal which reduced it to six months imprisonment on the 9<sup>th</sup> of March 2007 to be served extra murally.
- [33] According to the judgment of the Independent Legal Service Commission delivered on the 25<sup>th</sup> of January 2010 the facts relating to the appellant's offence, as set forth in the judgment of the Supreme Court on appeal by the appellant, were as follows:

***"On the 24<sup>th</sup> July 2003 the trial was due to start in the Magistrates Court at Suva of one Sahadat Attai Khan. He was charged with corruptly seeking, as a Land Transport Authority Officer, \$200 from the registration of a second-hand vehicle. The owner of the car and the person from whom it was alleged he had sought the money was Rajendra Narayan. The Accused was Mr. Khan's defence counsel. Subsequently in February 2005 Mr. Khan was acquitted of that charge.***

***Prior to the Khan hearing, on 22<sup>nd</sup> July 2003, Mr. Narayan informed the investigating officer that he had been approached by the Accused. The police took advice from the Director of Public Prosecutions Officer. It was then agreed to give Mr. Narayan a digital recording device to record any further conversation with the***



*Accused on the topic. Mr. Narayan agreed to this course.*

*On the next day, 23<sup>rd</sup> July 2003, a conversation took place between the Accused and Mr. Narayan. It started when they were in a vehicle travelling to the scene of an accident in which the Accused's son had been one of the drivers. In the course of the conversation the Accused mentioned the court case the next day. He advised Mr. Narayan to change his evidence to some extent, and the Accused told him what to say in its place.*

*The original evidence from Mr. Narayan was that Mr. Khan had taken the \$200 from him and placed it under a book. Mr. Khan then pulled out a file pretending to read it in order to hide his actions from a woman who had come to the door of his office.*

*The accused told Mr. Narayan to keep to his original story which he need not lie about. But that when he came to describe handing over the money to Mr. Khan he should say that he hid it under a book or register because a woman came into the room. He was to say that he never actually handed the money over to Mr. Khan. He should add that Mr. Khan did not see him do any of this. The rest he could leave to the Accused.*

*The Accused promised that once his client was acquitted he would sue the police. He would not make Mr. Narayan a party to those proceedings. Instead he would pay Mr. Narayan an unspecified sum of money out of the lump sum obtained thereby in damages.*

*The Accused was interviewed by police under caution on 24<sup>th</sup> July 2003. He availed himself of his constitutional right to consult a lawyer and did so before the main questioning commenced. He said he had been practising as a Barrister and Solicitor since 1994, and was admitted as such in New Zealand, Fiji, Tasmania and Queensland. He was a Commissioner for Oaths and a Notary Public.*

*When it was suggested that he had met the complainant and asked him to change one part of his story in the corruption case against Attai Khan, the Accused said the allegation was false. More details of the conversation were put to him but he said they were false.*

***He asserted that he wanted to save Attai Khan in his court case because he believed he was innocent. He denied discussing anything to do with the case with Mr. Narayan. At least a part of the digital recording was played to the accused and he denied that one of the other voices was Mr. Narayan's. He was positive the voice was not his own. He said Mr. Narayan was lying in saying that it was his voice. He also alleged Mr. Narayan had offered him \$45,000 if he could have Attai Khan convicted for corruption.***

***In these proceedings the Accused has accepted that the translation of the recording in Hindi is essentially correct save for a few inconsequential inaccuracies. He now accepts that it was indeed his voice in the recording, as well as that of Mr. Narayan. He admits the offence, and admits that he had made the approach to Mr. Narayan to change his evidence, what Mr. Raza called "one stupid act," and "one act of madness."***

***Besides being a lawyer in private practice, the accused has no previous convictions."***

#### **COMPLAINTS NUMBERS 2,3,4**

[34] It is useful to mention here the other three complaints against the appellant which were as follows:-

##### **Complaint No. 2**

This alleged that the appellant was guilty of Unsatisfactory Professional Conduct contrary to Section 81 of the Legal Practitioners Decree in that between the 1<sup>st</sup> day of June 2004 and the 13<sup>th</sup> day of June 2005 the appellant delayed the payment of the sum of \$6,750.00 to one Kishore Kumar which had been deposited into the appellant's Trust Account as rent money received from EAGLE BOY'S PIZZA in relation to the tenancy agreement between Kishore Kumar and Eagle Boy's Pizza, Suva dated the 2<sup>nd</sup> day of October 2004, which conduct occurred in connection with the appellant's practice of law falling short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner. The appellant denied the

charge but the Commissioner fined him \$1000 and granted a stay of execution.

[35] Complaint No. 3

Complaint No. 3 alleged that the appellant misled one Narendra Prasad as to the amount of costs and fees which he was going to charge in respect of a charge of manslaughter. This complaint was dismissed by the Commissioner.

[36] Complaint No. 4

In this complaint one Latchman alleged that he entered into a sale and purchase agreement in respect of Land described in CT 3178 in return for the transfer of his taxi permit LT 1566 to the vendor of the land.

[37] An agreement to this effect was drafted by the appellant and executed by the parties and provided that the date of settlement was to be when the property is fully subdivided or "properly marked and approved for development".

[38] The breach alleged in the complaint was "a breach of Section 83 (1) (b) of the Legal Practitioners Decree 2009". The Commissioner stated that this Section would appear to have nothing to do with the complaint as it related to the charging of excessive legal costs on fees. He said it would appear that the complaint should have been brought Under Section 82 (1)(b) of the Legal Practitioners Decree dealing with professional misconduct and evidenced inter alia by unsatisfactory professional conduct or Section 81 being conduct which fell short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

[39] The Commissioner then continued, "On the evidence before me and taking into the gravity of the facts to be provided I cannot be satisfied that the Respondent is guilty of professional misconduct as defined in Section 82 of

the Legal Practitioners Decree, however I do consider the Respondent to be guilty of unsatisfactory professional conduct as defined in Section 81 of the Legal Practitioners Decree”.

[40] He then continued in the next two paragraphs as follows:

***“The decree is silent as to my capacity to find the Respondent guilty of unsatisfactory professional conduct when the allegation calls for a finding of professional misconduct. The Commission is however not a court or tribunal of pleading and accordingly there would appear to be no impediment to such a finding, providing of course that the Respondent is afforded natural justice. The allegation is fully particularised and I see no prejudice to the Respondent.***

***I find therefore that the Respondent is guilty of unsatisfactory professional conduct”.***

[41] Not unnaturally the appellant alleges that in finding him guilty of unsatisfactory professional conduct for the reasons he gives in paragraphs 85 and 86, the Commissioner erred in law. He says that he could not be convicted of an offence with which he was not charged and that the reasons the Commissioner gives in paragraph 86 that there would appear to be no impediment to such a finding because the Tribunal was not a Court or Tribunal of pleading, provided that the appellant was afforded natural justice, are wrong in law.

[42] This Court considers that this argument might succeed before the Full Court and that at least the appellant should be given the opportunity of presenting such an argument there. On one view, in our judgment it would be open to the Full Court to find that the appellant was denied natural justice by the decision of the Commissioner.

[43] We therefore consider that the appellant has an arguable ground of appeal here and that, subject to what we say hereafter, *prima facie* he would be

entitled to be granted a stay for some period because of the Commissioner's apparently making a finding that was wrong in law.

- [44] In the result the Commissioner fined the appellant \$1000 and granted a stay.

### **COMPLAINT No. 1**

- [45] Most of the argument before this Court concerned the Commissioner's striking off the appellant from the Roll of Barristers and Solicitors.

- [46] The appellant claims that this was too drastic a penalty for only one offence of attempting to pervert the course of justice and either the finding of the Commissioner should be set aside altogether on the ground that the appellant was not allowed to mitigate before the Commissioner handed down his penalty or that if the appellant were to be struck off the Roll, this should not have been for ever but for a limited period.

- [47] This Court is not sure whether the appellant realizes the seriousness of the offence of which the Commissioner found him guilty. If he is labouring under such a view then this Court immediately hastens to disabuse him of it. The offence of which he was found guilty strikes at the root of the standards required by the public of the legal profession.

- [48] Honesty and truthfulness at all times in dealing with the public and the judiciary are the basic essentials for the conduct of any legal practitioner. The appellant has been found guilty of breaching this principle so that arguably the Commissioner's finding can be justified. That said, however, it must not be forgotten that the Court here is dealing only with an application by the appellant for a temporary stay of the Commission's judgment.

[49] He has told us that if the Court grants him a temporary stay on any conditions which we impose this will be only to enable him to complete some unfinished work for existing clients.

### **THE RESPONDENT'S POSITION**

[50] The Respondent maintains her objection to the appellant being granted any stay pending appeal on the basis of the public interest and the need to uphold the reputation and integrity of the legal profession. It is submitted that the granting of a stay would undermine the public interest as well as of the public's confidence in the legal profession.

[51] These claims may well be true but it is also true that this Court will not be influenced by such claims if, in a given case, it is satisfied that a lawyer who has been disciplined by the Independent Legal Services Commission has been denied natural justice by the Commission.

[52] For this Court to do otherwise would be to make a mockery of the term "judicial independence".

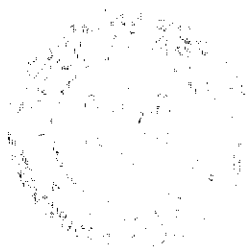
[53] At this juncture the record of the Commission is not available – it has not yet been prepared.

[54] The Court is therefore not able to decide whether there is any merit in the appellant's claims that he was denied a fair hearing.

[55] If it transpires that there is no substance in the appellant's allegations against the Commission then the appellant should be left in no doubt that the Court will need a power of persuading that it should interfere with the Commissioner's finding.

- [56] In the circumstances, and bearing in mind as we must that this is only an interlocutory application for a limited stay of the Commissioner's finding, the Court is prepared to assist the appellant to this extent, at least for the time being, namely that the appellant is granted a stay of execution of the Commissioner's judgment on Complaint No.1 until the call-over of the list for the September Session which will be on the 8<sup>th</sup> of June 2010 on condition that he does not accept any new work henceforth.
- [57] If the Court is not satisfied that the appellant has not taken any steps or any satisfactory steps to expedite the hearing of his appeal, primarily by the preparation of the Commission's record, then we will have no hesitation in cancelling this temporary stay.
- [58] The Order of the Court is that the appellant is granted a temporary stay of the finding dated 25<sup>th</sup> January 2010 of the Independent Legal Services Commission against him on the first complaint until the 8<sup>th</sup> of June 2010.
- [59] Whether or not any extension of the stay will be granted will depend on the circumstances existing on the 8<sup>th</sup> of June.

Dated at Suva this 7<sup>th</sup> day of May 2010.



*John E. Byrne*

**John E. Byrne, Acting President**

*W. Calanchini*

**William D. Calanchini, J.A**