

IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL APPEAL NO.ABU 0064 OF 2014
(ILSC Matter No. 26 of 2013)

BETWEEN : **AMRIT SEN**

Appellant

AND : **CHIEF REGISTRAR**

Respondent

Coram : **Calanchini, P**
Basnayake, JA
Kumar, JA

Counsel : **Mr. G. O'Driscoll for the Appellant**
Mr. A. Chand & Mr. V. Prasad for the Respondent

Date of Hearing : **09 November 2016**

Date of Judgment : **29 November 2016**

JUDGMENT

Calanchini , P

[1] I have read in draft form the judgment of Basnayake JA and agree that the appeal should be dismissed with costs.

Basnayake, JA

[2] This is an appeal against the Ruling of the learned Commissioner of the Independent Legal Services Commission (Commission) delivered on 8 August 2014 refusing to stay the proceedings before the Commission. When this case was taken up for hearing counsel for the appellant and the respondent invited court to decide this case on the written submissions tendered. Short oral submissions were made based on the written submissions.

- [3] The appellant (original 1st respondent) was noticed by the Commission on 23 October 2013 under Section 111 (1) of the Legal Practitioners' Decree 2009 on allegations of professional misconduct made by the Chief Registrar of the High Court (pg. 183 Tab 11 of the Record of the High Court (RHC).
- [4] Allegations 1, 2 & 3 are against the appellant. Allegations 4, 5 & 6 are against the original 3rd respondent. Allegations 7 & 8 are against the original 2nd respondent. They are all legal practitioners. All these allegations are concerning the Crown Lease No. 12426.
- [5] The original 2nd and 3rd respondents are not parties to this appeal as an application for a stay was made by the appellant. The original 2nd and 3rd respondents did not make an application for a stay of proceedings.

The Allegations

- [6] The allegations against the appellant are as follows:-
1. Count 1: Amrit Sen a legal practitioner, being the principal of Maqbool & Company, having known or ought to have known that he had unlawful custody of the original Crown Lease document No. 12426, failed to return the said Title, which conduct was an act of professional misconduct pursuant to section 82 (1) (a) of the Legal Practitioners' Decree 2009.
 2. Count 2: Amrit Sen a legal practitioner, being the principal of Maqbool & Company while in the practice of law demanded \$2000.00 in exchange for the original title of Crown Lease No. 12426, having known or ought to have known that he had unlawful custody of the original Crown Lease Title No. 12426 and that the Original Crown Lease Title No. 12426 should be in the custody of the Registrar of Titles at all times,

which conduct was an act of professional misconduct pursuant to section 82 (1) (a) of the Legal Practitioners' Decree 2009.

3. Count 3: Amrit Sen a legal practitioner, being the principal of Maqbool & Company while in the practice of law improperly received payment of \$2000.00 in exchange for the original title of Crown Lease No. 12426 without issuing a receipt, which conduct was an act of professional misconduct pursuant to section 82 (1) (a) of the Legal Practitioners' Decree 2009.

The grounds in support of a stay or dismissal of proceedings

[7] On 17 February 2014 the appellant moved by way of summons (dated 10 February 2014) for a stay of the proceedings (pgs. 9 & 10 under Tab 5) on the grounds that:-

1. The charges against the first respondent (appellant) are prejudicial by reasons of delay. In particular it concerns his role as a solicitor acting for his client Mr. Shiu Sami Naidu between the year 1994 and February 1996, which client had passed away sometime in the year 1997, and the 1st respondent does not have the relevant file pertaining to the dealings which are relevant to defend the charges. Further, the Registrar of Titles has not provided all the relevant records and information to enable the 1st respondent to defend these charges.
2. The charges against the 1st respondent are defective. It does not constitute professional misconduct by reason of the fact that the Crown Lease No. 12426 given by his office of Maqbool & Company to Kohli & Singh was presented to the Office of the Registrar of Titles for transfer to Ram Karan

and was accepted by the Office of the Registrar of Titles as the lessee's copy.

3. The charges against the 1st respondent are in breach of Section 14 (1) (a) of the Constitution of the Republic of Fiji.

The Ruling of the Commissioner

- [8] The learned Commissioner after considering the oral and written submissions refused the application for a stay. The learned Commissioner held that a stay can be granted if there is an abuse of process or if the delay within the commission is so inordinate that it would be unconscionable for the matter to proceed. Stay is not a remedy to be granted on the basis of a paucity of evidence. The learned Commissioner ruled out any delay in the Commission.
- [9] The learned Commissioner further held that the nature of the allegation does not necessitate his having the file in his possession. The allegation relates to the appellant holding on to the original document when it should have been in the custody of the Registrar of Titles.
- [10] The appellant took up a valid defence on this charge. He stated that he was having the lessee's copy and not the original. The learned Commissioner held that those are matters for evidence and determination at the hearing.
- [11] With regard to the violation of section 14 (1) (a) of the Constitution 2013 the learned Commissioner held that there is no evidence before the Commissioner that possession of the original Registrar's copy of the lease was not misconduct in 1995, which year the misconduct allegedly took place.

Grounds of Appeal

- [12] On 27 August 2014 the appellant appealed to set aside the ruling of the learned Commissioner and for an order to stay the proceedings with costs on the following grounds:

- i. That the learned Commissioner has erred in law by misdirecting himself on the law pertaining to stays by holding that there has to have been an inordinate delay within the Legal Services Commission for a stay to be granted when the proper test was whether the lapse of time since the events which are alleged against the practitioner is such that the practitioner is seriously prejudiced in the conduct of his defence that in all of the circumstances it would be unconscionable for the matter to proceed.
- ii. That the learned Commissioner has erred in law in holding that the paucity of evidence was a matter for the eventual hearing when in fact detailed prejudice was deposed in the affidavit of the appellant detailing the relevant documents which were contained in the appellant's file but could not be retrieved by reasons of disposal of the file and not contradicted by the respondent.
- iii. That the learned Commissioner has erred in law and in fact in holding that the proceedings against the appellant was not an abuse of process when the chain of events and facts as presented by the respondent conclusively showed that the offence was incapable of being committed on the chain of events and on the summary of facts as presented by the respondent.
- iv. That the learned Commissioner has erred in law in failing to hold that the proceedings were an abuse of process when the purported Crown Lease No. 12426 was not produced before the Commission and to the appellant notwithstanding an application by the appellant for discovery of the same which was imperative to allow the appellant to defend the charges.
- v. That the learned Commissioner has erred in law and in fact in taking in to consideration irrelevant matters and failing to take in to consideration relevant matters in particular the detailed affidavit of the appellant who had conclusively set out the chain of events and the fact that the Crown Lease

No. 12426 given to him from the original lessee and handed over to Ami Kohli was in fact the lessee's copy.

- vi. That the learned Commissioner has erred in law and in fact in holding that the appellant's file records were irrelevant, contrary to the appellant's detailed affidavit unchallenged by the respondent wherein he had unequivocally maintained that the relevant searches from the Titles Office at the material time of receiving the relevant lease in the years between 1994 and 1996 would have conclusively proved that he was in possession of the lessee's copy.
- vii. That the learned Commissioner has erred in law and in fact in failing to hold that it was impossible for the Registrar of Titles to deal with the Registrar's copy of the lease as the Lessee's copy and enter memorials when such procedure was neither available under the Land Transfer Act Cap 131 nor permitted by any law, thereby rendering the entire set of charges a nullity on the facts.
- viii. That the learned Commissioner has erred in law in holding that Section 14 of the Constitution was not applicable on the basis that the appellant had to produce evidence to show that the allegations appearing in the counts was not misconduct in 1995 when they were alleged to have been committed.
- ix. That the learned Commissioner has erred in law by shifting the burden on the appellant to prove through evidence before the Commission that possession of the original Registrar's copy of the lease was not a misconduct in 1995 contrary to the interpretation of Section 14 of the Constitution of Fiji 2013 that unequivocally prohibited a person to be tried on any act or omission that was not an offence either under domestic law or international law at the time it was committed or omitted.

- x. That the learned Commissioner has erred in law in failing to hold that the Constitution of Fiji was a Supreme Law that superseded Section 101 (2) of the Legal Practitioners' Decree and further erred in holding that section 101 (2) of the Legal Practitioners' Decree permitted charges filed against the appellant for purported acts or omissions prior to 2009 contrary to a correct interpretation of the said section.
- xi. That the learned Commissioner has erred in law in failing to hold that the charges against the appellant were prejudicial and an abuse of process on the totality of the disclosure provided and in the absence of the appellant having his relevant file and documents to argue his defence.
- xii. That the entire decision of the learned Commissioner is unconstitutional
- xiii. And such further and other grounds as the Appellant may be advised in due course and upon receipt of a copy of the record of the proceedings.

Submissions of the learned counsel and analysis

- [13] In the written submissions the learned counsel for the appellant has addressed court under four categories as grounds 1, 2, 3 & 4. Under ground 1 he has considered what is stated in the grounds of appeal No. 4. Grounds of appeal Nos. 3, 5 and 7 have been discussed under category 2. Grounds 1, 2, 6 & 11 have been considered under category 3 and finally grounds 8, 9 & 10 under category 4.
- [14] In his first category the learned counsel (ground No.4) complains that the original crown lease has not been disclosed. The learned counsel for the respondent explained the reason for not producing the original Crown Lease, as it has been kept with the police. The learned counsel for the respondent undertook to produce the original if the Commission so directs.
- [15] However a reconstructed copy of this Crown Lease has been produced and appears at pages 224 & 225 of the RHC. The appellant in a caution interview on 13 April 2010 (pgs. 282 to

284) had admitted that he was in possession of the Crown Lease. The appellant had given the following answers to questions by the police;

“Q 14. Now look at this Crown Lease number 12426 with stamp duty number 94962 (shown to Amrit Sen). What you have to say on this Title?

A. According to my statement given to the police on 8/12/2005 Maqbool and Co. had his Crown Lease that was given to this office by Shiu Sami Naidu and my office had acted in accordance with his instruction.

Q 15. What was his instructions?

A. I can't recall because I do not have the file now.

Q. 16. When did Shiu Sami give this Title to you?

A. I cannot recall the exact date.

.....

Q. 21.

A. I only wish to state that I had given a statement to the police earlier and the police had brought me Crown Lease No. 12426 and shown it to me. They asked me to give a statement and I gave a statement and the details of the lease provided to me by the police....”

- [16] In a statement made to the police on 11 March 2011 (pg. 293) the appellant had stated as follows:-“Further to my statement which I gave to the police on 8 December 2005 at no time I denied possession of Crown Lease # 12426..”. On the same day in a caution interview the appellant was questioned over this Crown Lease as follows:-

“Q.2. Do you remember that you were interviewed by D/IP Munsami on 13/4/2010?

A. Yes

Q.3. As per your answer to Question 16 you cannot recall the exact date but can you tell me if this title was in your possession?

A. Yes.....”

- [17] The above statements and the interviews were made while the police were investigating into his having in his possession the Crown Lease No. 12426. The interview notes along with the annexures had been submitted to the appellant at the inquiry before the Commission. How could the appellant now state that there is no such Crown Lease? A reconstructed copy of the lease has been produced, and the Original Lease, the respondent had undertaken to produce through the police.

- [18] The learned counsel for the appellant has answered to grounds of appeal Nos. 3, 5 & 7 under category No. 2. The learned counsel submits that what was given to him was not the original, but the lessee's copy and therefore the offence was incapable of being committed. This submission cuts across the admission made at the interview with regard to possession of the Crown Lease.
- [19] It is to be noted that the learned counsel had taken up a perfect defence which he is capable of taking up before the Commission. He is fully entitled to confront the witnesses and capable of meeting the respondent's allegation head on. Having such a good and strong defence, and the capacity to demolish the allegation that he was in possession of the original Crown Lease 12426, why did he ask for a stay?
- [20] The learned counsel for the appellant in his written submissions in para. 15 pg. 7 states thus; "As a matter of fact we do not understand as to why the Chief Registrar has made a complaint when there has been no complaint against the appellant from any person whatsoever". This submission is unfair and not acceptable. It tends to indicate that the Chief Registrar had something personal against the appellant.
- [21] The Record of the High Court reveals that investigations commenced by the police on a complaint made by one Krishna Samy Naidu, a son of Shiu Sami Naidu, who was a client of the appellant. It was on this complaint that the appellant's statement was recorded by the police in 2005. It appears that Krishnan Samy Naidu has complained to the Chief Registrar and to the ILSC on learning that that was his last resort.
- [22] The Legal Practitioners' Decree 2009 makes provision under section 99 for individuals to complain to the Chief Registrar. It also makes provision for the Chief Registrar under section 100 (1) to investigate against legal practitioners on its own initiative. The relevant provisions are as follows:-

Section 99 (1): Any person or entity may make a complaint to the Registrar regarding any alleged professional misconduct or unsatisfactory professional conduct by any practitioner or law firm.....

Section 100 (1): *The Registrar may investigate the conduct of a legal practitioner or a law firm....if the Registrar has reason to believe that the conduct may amount to professional misconduct or unsatisfactory professional conduct, even though no complaint has been made about the conduct or a complaint made under section 99 by any person or entity has been withdrawn.*

A brief history

- [23] As it appears in the RHC the appellant's client, Shiu Sami, had lent a sum of \$36000.00 to one Ram Karan on the deposit of the duplicate of the Crown Lease No. 12426 as security. After the death of his father, Krishna Samy Naidu had given this duplicate lease 12426 to Sherani & Company, solicitors for safe keeping. In 1996 Ram Karan has applied for a provisional Crown Lease on the basis that he lost the duplicate. On 15 October 1996 Sherani & Co. has written to the Registrar of Titles objecting to the issuance of a provisional lease on the basis that the duplicate is deposited with them (Sherani & Co.) for safe keeping. As a result, the Registrar of Title has cancelled the issuance of a provisional lease.
- [24] Investigations reveal that the original Title Lease No. 12426 was missing in the Titles office and a reconstructed copy made. Investigations also reveal that the Crown Lease 12426 was used to obtain a loan of \$10000.00 from ANZ bank. Investigations reveal that Ram Karan who allegedly deposited the duplicate of 12426 with Shiu used the original Title to register a mortgage on 22 July 1999 with the Registrar of Title. Investigations also reveal that one of the original respondents, namely, Parshotam had confirmed in writing that Ram Karan gave them the Original Title.
- [25] On finding that the Original Lease was mortgaged with ANZ for Karan by Parshotam on 22 July 1999, this matter was reported to the police. Investigations further reveal that another original respondent, namely, Ami Kohli had obtained the original Lease from the appellant for \$2000.00 for Ram Karan.
- [26] The learned counsel for the appellant also submits that this offence is incapable of being committed. Paragraphs 17 to 28 (pgs. 8 14) of his submission is that in the normal course

that this offence cannot be committed. I think the learned counsel for the appellant should leave that to the respondent.

[27] The learned counsel strenuously submitted that delay has caused prejudice and further that the delay has not been explained. I have already outlined the brief history in this case. Witnesses would explain further with regard to delay in bringing these charges before the Commission. **In Tevita Nalawa v State** (unreported CAV 002/09 (3 August 2010) the Supreme Court dealing with delay held that “At common law the authorities are to the effect that where a victim delays reporting a case the test is not whether the delay is justified but whether a fair trial was possible (para 17)...Most common law jurisdictions recognize the right of an accused person to a fair trial without unreasonable delay (para 20). Fair trial has been described as trial according to law. This includes the right to counsel, the right to disclosures, the right to adequate time and facilities in order to prepare a defence, the right to remain silent, and the right to trial without delay (para 21).

[28] In the above case the Supreme Court formulated the following principles as basic to the Common Law;

- (i) *Even where delay is unjustifiable a permanent stay is the exception and not the rule.*
- (ii) *Where there is no fault on the prosecution very rarely will a stay be granted.*
- (iii) *No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can be held.*
- (iv) *On the issue of prejudice, the trial court has processes which can deal with admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay.*

[29] The Supreme Court relied on the case of **Attorney-General's Reference** (No. 1 of 1990) (1992 Cri App R 296) where the Court of Appeal of England held that there should never be a stay unless the defendant showed on the balance of probabilities that due to delay he would suffer serious prejudice to the extent that no fair trial could be held.

- [30] The governing factor must always be whether an accused can be tried fairly without any impairment in the conduct of his defence and if that question can be answered affirmatively, the prosecution should not be stayed (**Mohammed Sharif Shaim v State** (unreported Misc. Action No. 17 of 2007)).
- [31] His Lordship Justice Calanchini in **Anand Kumar Singh v Chief Registrar** (2013 FJCA 141) refused to grant a stay of execution pending appeal in the absence of exceptional circumstances. His Lordship held that, “In my view the public confidence in the legal profession in Fiji can only be established and maintained by effective professional regulation and enforcement. The task of effective regulation falls to the Chief Registrar under the Decree. Any legal practitioner who disregards attempts by the Regulator to protect the public is undermining the regulatory regime in the Decree thereby undermining public confidence in the profession” (para 16).
- [32] The learned counsel also submits that the Legal Practitioners’ Decree came into effect on 22 May 2009. The acts complained of were purported to have been committed between 1995 and 1996. The learned counsel submitted that Section 14 (1) (a) of the Constitution 2013 has placed a specific prohibition.

Section 14 (1) (a) of the Constitution 2013

- [33] Section 14 (1): A person shall not be tried for (a) any act or omission that was not an offence under either domestic or international law at the time it was committed or omitted. The submission of the learned counsel is that at the time of committing the alleged acts the Legal Practitioners’ Decree was not in operation and therefore the Commission is without jurisdiction. The above submission is made on the presumption that the appellant had been charged for an offence. The learned counsel has considered section 82 (1) (a) as constituting an offence.
- [34] An offence is an act, attempt or omission punishable by law (Section 4 (1) of the Crimes Decree 2009 Cap 17A). Interpretation Act Section 2 (1) describes an offence as follows:

“Offence” means any crime, felony, misdemeanor or contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided”. Penalty means the maximum penalty which may be determined and imposed by a court (Section 3 (4) of the Sentencing and Penalties Decree Cap 17B. Oxford Dictionary defines an offence as a breach of a law or rule; an illegal act.

[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.

[36] For the above reasons I am of the view that the grounds raised are not substantial to stay the proceedings. In the event of proving the caution statement of the appellant, that itself would be sufficient to prove some allegations. Considering the seriousness of the allegations and the voluminous evidence I am of the view that the matters presented by the appellant are not sufficient to stay the proceedings. Hence the appeal is dismissed with costs in a sum of \$3500 payable by the appellant to the respondent. I am also of the view that this inquiry should be heard and concluded expeditiously.

Kumar JA

[37] I too agree that the appeal should be dismissed with costs.

The Order of the Court:

Appeal is dismissed with costs fixed at \$3500.00 payable by the Appellant to the Respondent.

W. Calanchini
.....
Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL



E. Basnayake
.....
Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

K. Kumar
.....
Hon. Mr. Justice K. Kumar
JUSTICE OF APPEAL