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

Civil Appeal No. ABU 0076 of 2016
(On Appeal from ILSC No. 029 of 2013)

BETWEEN	:	**CHIEF REGISTRAR**
		Appellant
AND	:	**DEVANESH PRAKASH SHARMA**
		First Respondent
AND	:	**R PATEL LAWYERS**
		Second Respondent
Coram	:	**Basnayake JA** **Lecamwasam JA** **Almeida Guneratne JA**
Counsel	:	**Mr. A. Chand for the Appellant** **Mr. D. Sharma (in person) for the 1st Respondent and for the 2nd Respondent**
Date of Hearing	:	**9 May 2018**
Date of Judgment	:	**01 June 2018**

JUDGMENT

Basnayake JA

[1] I agree with the reasons, conclusion and the orders proposed by Guneratne JA.

Lecamwasam JA

[2] I agree with the reasons and the conclusion of Guneratne JA.

Almeida Guneratne JA

[1] This is an appeal against a Ruling/Order of the Independent Legal Service Commission (ILSC) dated 12 November 2014. By that ruling the Commission permanently stayed and struck out charges in disciplinary proceedings initiated by the Appellant in terms of the Legal Practitioners Decree, 2009 (LPD) against a legal practitioner (1st Respondent) and his law firm (2nd Respondent) on a complaint to the Appellant made by an aggrieved client of the Respondents.

Background facts which had occasioned this appeal

[2] I shall recount the background facts to this appeal in chronological order.

The complaint made by the "aggrieved client" to the Appellant

[3] The complaint made by one Mr Rajini Kant (RK) as provided by Section 99 of the LPD dated 15 June, 2011 is at pages 63 – 64 of Vol. 1 of the Record of the High Court (RHC). The attachment thereto marked 'A', lists as many as 7 counts, particulars of which are given at pages 68 – 71 (RHC) which I shall advert to later at a stage which I perceive to be appropriate.

[4] The Appellant had referred the said complaint to the Respondents by his letter dated 23 September, 2011 to which the Respondents had sent their response by their letter of 11 October, 2011. The said responses with a detailed account of the background facts are found at pages 78 – 325 (Vol. 1 – RHC), which in essence is a total denial of the matters contained in the said complaint.

[5] On 27 November, 2013 the appellant filed charges against the Respondents (initially on 7 counts) later amended to 10 counts by an application filed on 3 March 2014

(vide: Annexure 'A' and Annexure 'B' attached to the Commission's ruling at pages 31 – 37 of Vol. 1 of the RHC read with pages 325 – 465 of Vol. 2 of the RHC).

[6] Upon the said charges being filed the Respondents filed a Notice of Motion and application dated 20 March, 2014 for a permanent stay and to strike out the Appellant's amended application (the charges) (pages 466 – 469 of Volume 2 of the RHC supported by affidavit of the 1st Respondent (pages 470 – 645 of Vol. 2 thereof) followed by a letter dated 16 June, 2014 for the 2nd Respondent sent to the Appellant (pages 646 – 691 of Vol. 2 of the RHC). The answering affidavit dated 4 July 2014 filed on behalf of the Appellant to the said motion dated 20 March, 2014 at pages 692 – 699 of Vol. 2 of the RHCwhich was followed by written submissions dated 22 July 2014 tendered by the Appellant (Respondent to the said motion of 20 March, 2014 (vide: Volume 3 of the RHC at pages 700 – 1166).

[7] Thereafter, the Respondents having filed submissions dated 6 August, 2014 in support of the motion/Application for a permanent stay and to strike out the charges in question (vide: pp.1167 – 1290 in Vol. 4 of the RHC), the Appellant had filed a set of supplementary submissions dated 29 September, 2014, that is, supplementing the submissions he had filed earlier dated 22 July, 2014 referred to earlier. (paragraph [9] above)

[8] Consequently, the said application for a permanent stay and to strike out the charges was taken up for hearing by the Commissioner on 22 May 2014 and continued through 16 June, 7 August, the proceedings finally concluding on 29 September 2014. (vide: pages 1291 – 1603 of Vol. 4 of the RHC). The application was allowed by the Commissioner by his order dated 12 November, 2014 against which the present appeal has been preferred. The Notice and Grounds of Appeal are at pages 4 – 20 of Vol. 1 of the RHC.

Summary of the initial observations made by the learned Commissioner with my reflectionsthereon

[9] The learned Commissioner observed thus:

(i) The complaint by (RK) being dated 15 June 2011 and 27 November, 2013 being the date the initial charges were filed by the Appellant. "At no time during these two years was any meeting sought with the firm nor the practitioner nor were they asked for further explanation or given a chance to respond to the specific allegations." (paragraph 5 at page 22 of the RHC, Vol. 1)

(ii) "There is no evidence before the Commissioner of any communication of the complaint to the practitioner." (paragraph 9, supra)

[10] The Commissioner himself had observed later in his order that,

"The Registrar having received the complaint on the 15 of June from the client (RK) of the firm and of the practitioner wrote to the firm (but not the practitioner) 14 weeks later (on 23 of September, 2011) enclosing a copy of the complaint and asking pursuant to Section 106 of the Decree for a copy of the client file and all other relevant documentation."

(paragraph 8 of the Commissioner's order – "the order") and at paragraph 10 thereof that,

"In response to that letter, the petitioner on behalf of the firm, whilst not directly requested to do so responded to the CR on the 11 of October by way of 50 page submissions in which he gave reasonable and quite plausible explanations for the complaints made..... "

Reflections thereon

(a) Whether explanations were "reasonable and quite plausible" was a matter for the Commission to decide and determine after hearing evidence. It is to be noted

that this was not a matter that could have been decided and determined on written submissions and documents. The very complaint (7 allegations) the Respondent's response ('50 page submission') involve contentious factual issues, not pure questions of law.

(b) At this point, I pause in noting that, the learned Commissioner himself had reflected thus: *"Let the evidence speak for itself"* (page 23 – RHC).

What was that evidence?

(c) There was no further obligation imposed on the Appellant after he had made available a copy of the complaint to the Respondents and called for explanation. He had weighed the matter and in pursuance of the statutory role imposed on him had decided to file charges. It is to be noted that, the Appellant in fact has the power under Section 100 of the LPD to investigate the conduct of a legal practitioner or a law firm etc, even without a complaint.(emphasis is mine).

(d) The Respondents lament that the Appellant had not shown courtesies to when they had requested for further and better particulars of the complaints in order that they may be properly addressed because the complaints had been made in very general termsis not a procedural matter the LPD warrants. The reference to "the complaints being made in very general terms" was again a matter for the Commission to decide and determine after inquiry on evidence. This is why counsel at some point of time left certain matters to the Commission, inas much as while investigations on a complaint is a matter for the Appellant (CR). Once charges are filed, the matter shall stand removed to the Commissioner for inquiry and determination which as I reflected upon earlier had to be decided on evidence, given the nature of the matter in question.

(iii) **Other observations, discussion, analysis by the Commissioner and his conclusion**

[11] I thought I will take the above cumulatively in as much as they all smack of alleged procedural shortcomings. In that regard the said alleged shortcomings such as, not replying to some letters written by the Respondents, on one occasion the Appellant informing that " due consideration will be given to it and our position will be made known to you" (referred to inparagraph 21 of the Commissioner's order) but not doing so, amending the initial charges without an opportunity being given to the Respondents to offer an explanation before doing so, a statement being taken from the complainant on 25 January, 2012 but not disclosed to the Respondents until the charges were initially filed on 27 November, 2013, not pursuing the possibility of a resolution and, not requiring a "sufficient and satisfactory explanation after the amended charges were filed.

Reflections on the above

[12] Taken at their highest, save for the matter in regard to the amendment of charges without prior Notice to the Respondents, none of the other matters that weighed with the Commissioner could be said to have been offensive to any provision in the LPD. Section 105(1) of the LPD vests a discretionary power on the CR to review a "satisfactory and sufficient explanation in writing of the matters referred to in the complaint." This in fact the Appellant did. CR had also acted in terms of Section 106. In so far as the requirement as regards Mediation is concerned, Section 109(1) (b) clearly does not make it mandatory although if an effort could have been made in that regard, that would have been ideal. Finally, there is the point made by the Commissioner at Paragraph 19 of his order in regard to the non – service of the amended charges.

[13] However, the Respondents grievance in regard to the amendment of charges, if Section 105(1) is properly construed, could apply only to those proposed amended charges. (charges 8, 9 and 10 (Annexure 'B' to the Commissioner's Order). But, the learned Commissioner went further.

[14] In the light of the above, I shall now proceed to make a determination of this appeal taking into consideration the following as well.

The basis for the Respondents Application to the Commissioner

[15] I shall begin with by referring to the basis on which the Respondents had submitted the impugned application to the Commission. That had been on the basis that, the Appellant (CR) or more particularly the Legal Practitioners Unit (LPU) of the CR's office had conducted a malicious prosecution against them and had engaged in 'rogue conduct' which had prevented them from defending themselves and that the whole proceedings were unfair and they had exhausted all efforts to get a response to their submissions.

The Commissioner's Conclusion and the orders

[16] *"59. This practitioner and this firm have been treated with rather outrageous prejudice and insouciance despite their repeated requests for particulars and submissions in defence. Their entreaties were ignored and even when shown that some of their charges had no factual basis they insisted on proceeding. In the end they appeared to give up and wanted this Commission to decide on the charges.*

60. The investigators and prosecutors have by their actions or inactions breached the Constitutional rights of the two Respondents enshrined in Sections 14(2)(b), 14(2)(e) and 14(2)(g). By talking only to the complainant and ignoring the Respondents, their right to a fair trial pursuant to section 15(1) has been breached.

61. This Commission has no hesitation whatsoever in finding that there has been a clear abuse of process in this matter. As a result the proceedings are stayed and the charges before the Commission are struck out." (pages 29 – 30 of Vol. 1 – RHC)

A crucial observation made by the Commissioner prior to arriving at his conclusion

[17] At paragraph 7 of his order the learned Commissioner under the heading Discussion, had observed thus:

"While this Commission has not seen nor heard any evidence that would go to even suggest that the allegations of misconduct against the practitioner and his firm are founded on malice, vindictiveness, there is much force in their submissions that they have been unfairly treated since the initial complaint of their client was made. The conduct of the LPU in investigating the complaint appears unfortunately to have been lackadaisical, to have been very one sided and biased and there appears to have been an attitude of ensuring that the allegation to be proved at any cost."

Analysis of the factual content in ascertaining whether the Commissioner's Order/Ruling bearsscrutiny

[18] In that regard, I have already addressed my mind to some aspects in my interim reflections earlier. I now proceed to make my deductions from that 'crucial observation' contained at paragraph 7 of the Commissioner's Order and the Conclusion and orders reached by him at paragraphs 59 to 61 thereof which I have recounted at paragraphs (19) and (20) respectively of this judgment.

[19] The Commissioner himself found that:

(a) there was no evidence to suggest that, there was malice or vindictiveness on the part of the Appellant.

(b) but, that, the Respondents had been unfairly treated with outrageous prejudice and insouciance in that the conduct of the LPUin investigating the complaint was lackadaisical, one sided and biased and "there appears to have been an attitude of ensuring that the allegation to be proved at any cost"

(c) that, some of the charges had no factual basis "In the end they appeared to give up and wanted this Commission to decide on the charges"

(d) that, the LPU (investigators and prosecutors) *"by their actions or inaction breached the constitutional rights of the two respondents enshrined in Section 14(2) (b), 14(2)(e) and 14(2) (g). By talking only to the complainant and ignoring the Respondents, their right to a fair trial pursuant to Section 15(1) has been breached."*

[20] I shall now deal with the factual content *seriatim* as follows:

(i) Re: (a) and (b) taken together

[21] There being no evidence "even to suggest that there was malice or vindictiveness", could the Commissioner, in the same breath, have said that, there was 'bias' depicting an attitude of ensuring that the allegation to be proved at any cost?

What Constitutes bias?

[22] Over the years a number of tests have been applied to determine 'bias' in a given situation.

The Reasonable or Mere suspicion test and its link to "a personal interest" and /or to "prejudice"

[23] In R v. Sussex Justices, ex-parte McCarthy [1942] 14B256 Lord Hewart C. J. formulated the applicable test thus:

"Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

[24] Even if an aggrieved party (such as the Respondents in the instant case) entertained "a reasonable or mere suspicion" (being of a subjective nature), the test would not be satisfied in the absence of "a personal interest" on the part of the Appellant. (vide: R vGaisford) [1892] 1Q.B. 381 and Cooper v. Wilson [1931] 2WB 309 at 324]

[25] 'Prejudice' no doubt could amount to 'bias' if one could find an element of 'hostility' (vide: R v. Handlely [1921] 61 DLR 656 and compare White v. Wuzech [1951] AC585]

[26] The learned Commissioner found that there was outrageous prejudice and insouciance in the conduct of 'the LPU.'

[27] With all due respect to the learned Commissioner, I could not see how that test could have been satisfied as against the Appellant who had, on the basis of the initial complaint (by RK) and after receiving the Respondents 50 page submission it is in response to that, that the Appellant had preferred charges. RK's allegations had been to the following effect.

(a) The delay on the part of the Respondents in attending to his matters;
(b) Failure to provide Accounts in connection thereto;
(c) Negligence of the Respondents resulting in the complainant being charged in the Nasinu Magistrate's Court;
(d) Overcharging of fees, failure to communicate and/or lack of communication by the Respondents with (RK),in their professional relationship as to the pending matters in court in general;
(e) And in particular, (RK's) allegations as to incompetence and alleged misrepresentation made by the Respondents in the context of his divorce litigation.
(f) And further,(RK's) allegation that, the Respondents had acted without his instructions in the context of his divorce action. (vide: pages 68 to 71 of the RHC)

The "Real likelihood of bias test", the "Real Danger test" and the "Real Possibility or Probabilitytest" in ascertaining 'bias'

[28] I surveyed the competing tests that had emerged in ascertaining 'bias' subsequent to the Sussex Justices decision (supra), viz: "the Real likelihood of bias test" (R v. CamborneJustices, ex parte Pearce [1955] 1QB41, also Hannam v. Bradford Corporation [1970] 1 WLR 937; the Real Danger test" [1993] AC646 in R v. Gough and the "Real Possibility or Probability test" (R v. Barnsley Licensing Justices [1960] 2QB 167 at 187).

The Common thread that runs through all those tests

[29] It is that, tribunals (I add the words statutory functionaries such as the Chief Registrar) not only in their actions but that they should also not be influenced by their personal interest. They should also avoid the appearance of labouring under such as influence. (see: Lord Campbell in Dimes v. Grand Junction Canal [1852] 3HLC 759 in that regard, cited in the Court of Appeal decision in Khan v. The Chief Registrar (ABU0068 of 2013 dated 25 September, 2014 at page 4 of the said decision)

[30] In the widest stretch of imagination it cannot be said that the Appellant could be said to have had any "personal interest" in the instant case. Indeed, no such suggestion had been made by the Respondents. The Commissioner himself had not said so. The Appellant had only acted in pursuance of his statutory function in terms of Section 100 of the LPD based on the initial complaint of RK and after considering the submission (explanation) made/given by the Respondents.

[31] The matter thus stood removed to the Commissioner's domain to exercise his jurisdiction prescribed under Section 121 of the LPD.

Re: the Commissioner's findings referred to at paragraph (22) (c) and (d) in this judgment

[32] The Commissioner held that, "some of the charges had no factual basis (and)" "in the end they (the LPU) appeared to give up and wanted this Commission to decide on the charges"

Two Aspects arise for consideration in that context

[33] The first is in regard to the initial charges (Annexure 'A' contained in the Order of the Commissioner). In that regard, the Commissioner himself is seen coming to a finding that, there had been no "malice or vindictiveness". The Appellant as earlier pointed out, had entertained (RK's) complaint, received the Respondents responses (running in to a 50 page submission) and, had filed charges.

[34] Consequently, the reference by the Commissioner to some of the charges (having) no factual basis "cannot hold water for, on his own reasoning, no evidence had been heard. How could a tribunal or a court come to such a finding without "evidence?"

[35] In fairness to the Commissioner, I am prepared to construe that reference as being a reference to the attempted/proposed charges 8, 9 & 10 (Annexure 'B' – supra)

[36] But then again, that relates to a procedural matter. The question is as to whether he could have struck out all the charges and granted a permanent stay of the proceedings.

[37] Consequently, I cannot subscribe to the learned Commissioner's view that there had been an abuse of process on the part of the Appellant.

What is abuse of process?

[38] Judicial precedents and treatises are replete as to what amounts to abuse of process the essence of which is "using the legal process for an ulterior collateral purpose."

(sec: Oxford Dictionary of Law, 8th ed. Jonathan Law (2015)

Purpose of Disciplinary Proceedings

[39] In the instant case the Appellant was only using his statutorily conferred power in commencing disciplinary proceedings in terms of Section 109(1) (c) of the LPD. I cannot see how the Respondents Constitutional right to a fair trial could have been breached in as much as the Appellant had not only the power but also a statutory duty to have commenced disciplinary proceedings the chief purpose of such proceedings being the protection of members of the Public from professional misconduct and unsatisfactory conduct of lawyers(vide: Sen v. ChiefRegistrar [2015] FJCA 160, at 174)

[40] In commencing proceedings in the instant case after receiving RK's complaint under Section 99, the Appellant had complied with the provisions of Section 103, 104, 105 and 106 of the LPD. The attempt to amend the initial charges by adding three more charges was a matter that went to procedure. The Commissioner had the discretion to decide on the said matter.

The Notice and Grounds of Appeal (pages 4 – 20 of Vol. 1 of the RHC)

[41] The Notice contains as many as 25 Grounds of Appeal most of which I trust I have already dealt with in the context of the factual content and the applicable legal principles. One outstanding matter remains to be addressed, that is, as to whether the learnedCommissioner had jurisdiction to have granted a permanent stay of the proceedings andstrike out all the charges.

[42] Section 121 of the LPD spells out the powers of the Commission on hearing. The provisions contained therein do not confer an express power to grant a permanent stay of the proceedings whether before or completing the hearing. Section 121(3) however decrees that,

"The Commissioner may make any interlocutory or interim orders as it thinks fit before making its final decision in an application for disciplinary proceedings against a legal practitioner or law firm ….."

[43] But, the impugned orders the Commissioner made had the effect of "a final decision" in as much as there was nothing left by the Commissioner to hear further. As held in Gounder v. The Minister of Health (ABU75 of 2008; 9 July 2008),

"Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

Every other application to the High Court should be considered interlocutory .... The following are examples of interlocutory application. 1. An application to stay proceedings." (paragraph 37 and [38] of the Judgment in that case).

[44] By parity of reasoning, I hold that, that judicial thinking applies to the Commissioner's jurisdiction under the ILSC legislation

Application of the Ratio in that decision to the instant case

[45] To begin with, the matter before the Commissioner did proceed to "a hearing" but as I have said earlier not on evidence but on submissions made by parties which the learned Commissioner himself accepted at paragraph 7 of his order (page 22 Vol. 1of the RHC) in so far as I saw, that was in relation to the initial 7 charges, to be fair by the Commissioner.

[46] Even in regard to the 3 additional charges the Appellant had attempted to introduce, though procedurally flawed in not having given notice to the Respondents to offer explanations thereto, that did not amount to "abuse of process".

Abuse of process and procedural flaws in the Conduct of Proceedings

[47] Consequently, it is imperative that, Courts and Tribunals must identify the distinction between abuse of process and procedural flaws in the Conduct of Proceedings.

[48] In the result, the application of the Respondents for a permanent stay and to strike out all the charges was misconceived and/or ill – founded, in as much as, the initial charges filed by the Appellant were not "frivolous, vexatious or in bad faith although the Respondents might have been justified if they had sought an interim stay in regard to the said additional 3 charges of the Commissioner in that regard and consequently the Commissioner had granted the same.

The Commissioner's approach in granting a permanent stay and striking out all the Charges

[49] The learned Commissioner in his Ruling at the very outset opined thus:

"2. In the Commissioner's judgment in Adish Kumar Narayan [Matter No. 009 of 2013], it was said that in only truly exceptional circumstances would the Commission entertain an interlocutory application (for the reasons given inNarayan).

3. This complaint and its prosecution do engender truly exceptional circumstances ..."

My assessment thereon

[50] Even if this court were to look for some persuasive guidance to be derived from Narayan, it is clear that, that Ruling stood confined to entertaining an interlocutory application for a stay of proceedings in truly exceptional circumstances but as I construethat Ruling, it did not go so far as saying that, the Commissioner could grant a permanent stay of proceedings.

[51] Before I pen my final conclusion on this matter I need only to say that, the Privy Council decision in Warren v. Attorney General for Jersey [2011] 2 A11ER 513 on which both parties relied on have no application or relevance to this case for the reasons I have articulated in this judgment hereinbefore while adapting the comment made in AmritSen v. Chief Registrar (Civil Appeal No. CBV0010 of 2016 – 27 October, 2017) that, "disciplinary proceedings such as the one before the Independent Legal Service

Commission should not be unduly delayed by applications for stay of proceedings, as the time is of the essence in these matters" (per Marsoof J, at page 1 of the said judgment).

[52] In the instant case, by a combination of a misconceived application filed on behalf of the Respondents and the assumption of jurisdiction to grant a permanent stay of proceedings in that regard by the Commissioner (for which Section 121 of the LPD carried no warrant), particularly in view of my finding that there was no abuse of process on the part of the Appellant in commencing proceedings it has resulted in the proceedings being delayed.

Conclusion

[53] For the aforesaid reasons, I have no hesitation in allowing this appeal.

One final matter to be addressed

[54] That was on account of what the Respondents had stated their submissions dated 27 April, 2018 at paragraphs 52 to 57 thereof which appeared to demonstrate that, the dust had settled in regard to the dispute between the complainant (RK) and the Respondents, therefore rendering the Appeal academic or moot.

[55] Mr. Chandon behalf of the Appellant would hear nothing of it, standing firm as he did on the ground that, while the matter between the Complainant and the Respondents was a matter for them, his role was to vindicate the proceedings commenced by the Appellant in the public interest which the Commissioner had found to be an abuse of process. Mr.Chand,took strong offence to what the Respondents had said in their said written submissions that, the continuation of disciplinary proceedings would amount to an abuse of process.

My Response to Mr. Chand's said stance

[56] The Court thought that, Mr. Chand's riposte was entitled to succeed having regard to his submission based on (i) the concept of public interest and (ii) allied thereto, the LPU's role to vindicate the proceedings it had initially commenced and (iii) continuation of the disciplinary proceedings therefore could not be regarded as an"abuse of process" (as he submitted, being a matter, in any event where the Appellant has not been a party to the subsequent dealings between the Complainant and the Respondents).

[57] In that regard, this Court paid due regard to decisions such as the case of Public ServiceAssociation v. Kotobalavu [2004] FJCA 51/11 November, 2004, Centre for PolicyAlternatives v. DayanandaDissanaike [2003] 1 Sri Lanka Reports 277, RajendraChaudhary v. Chief Registrar (Civil Appeal No. ABU No. 63 of 2012 – 27/02/15) and a more recent judgment in The Electoral Commission v.The Supervisor of Elections [2016] FJCA 159.

Conclusions

[58] For the aforesaid reasons taken cumulatively I conclude that:

(i) The Commissioner had no jurisdiction to grant a permanent stay of the proceedings that had been concerned by the Appellant and to have struck out all the charges:

(ii) However, it would be open for the Commission to allow or not the said additional charges (Annexure 'B' – attached to the Commissioner's Ruling) on whatever terms it may deem fit subject to steps parties may be directed to take consequent thereto;

(iii) In any event, the Appellant is free to proceed with the initial charges he had preferred against the Respondents (Annexure 'A' – attached to the Commissioner's Ruling).

[59] Consequently, I proceed to make the proposed orders in this appeal as follows.

1. *The Appeal is allowed.*
2. *The Registrar of this Court is directed to fix a date for further inquiry before the ILSC in consultation with the appropriate authorities*
3. *In the facts and circumstances of this case the Respondents shall pay to the Appellant as costs of this appeal, a sum of $5,000.00.*

.....

Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL