

IN THE INDEPENDENT LEGAL SERVICES COMMISSION
AT SUVA

ILSC No. 003 of 2021

BETWEEN: CHIEF REGISTRAR

APPLICANT

AND: DARSHIK NAIR & SHOMAL KANT

RESPONDENT

Counsel: Mr. Ravinesh Lal for the Chief Registrar
Mr. Darshik Nair & Ms. Shomal Kant, In Person

Date of Hearing: 13th September 2022

Written submissions: 21st September 2022

Date of Ruling : 5th January 2023

JUDGMENT

Introduction

1. On 23rd March 2021, this Application was filed by the Chief Registrar setting out two allegations of Professional Misconduct against the Respondents Darshik Nair and Shomal Kant as follows:

COUNT 1

PROFESSIONAL MISCONDUCT: *Contrary to section 82(1)(a) of the Legal Practitioners Decree of 2009.*

PARTICULARS

DARSHIK NAIR, legal practitioner, being the partner of SAIRAV LAW, failed to respond to matters contained in a complaint lodged by one SUCHINDRA PRAKASH SINGH and ATILA DEVI dated 17th June 2020, as required by the Chief Registrar by a notice dated 25th January 2021 pursuant to section 106 of the Legal Practitioners Decree 2009 and thereafter failed to respond to a subsequent reminder notice dated 15th February 2021 issued by the Chief Registrar pursuant to section 108(1) of the

Legal Practitioners Decree 2009, which conduct is a breach of section 108(2) of the Legal Practitioners Decree 2009 and is an act of professional misconduct.

COUNT 2

PROFESSIONAL MISCONDUCT: *Contrary to section 82(1)(a) of the Legal Practitioners Decree of 2009.*

PARTICULARS

SHOMAL KANT, legal practitioner, being the partner of SAIRAV LAW, failed to respond to matters contained in a complaint lodged by one SUCHINDRA PRAKASH SINGH and ATILA DEVI dated 17th June 2020, as required by the Chief Registrar by a notice dated 25th January 2021 pursuant to section 106 of the Legal Practitioners Decree 2009 and thereafter failed to respond to a subsequent reminder notice dated 15th February 2021 issued by the Chief Registrar pursuant to section 108(1) of the Legal Practitioners Decree 2009, which conduct is a breach of section 108(2) of the Legal Practitioners Decree 2009 and is an act of professional misconduct.

The statutory basis of the charges

2. Upon the receipt of a complaint or commencement of an investigation against a practitioner the Registrar is required to refer the substance of the complaint or the investigation to the legal practitioner or the partner as the case may be. Pursuant to section 106, the 'Registrar is empowered to require production of documents and section 106 is as follows:

Registrar may require production of documents etc

106. The Registrar may require by notice in writing to a legal practitioner or a law firm, the production by the legal practitioner or the law firm to the Registrar, at a time specified in that notice, of books, papers, files, securities, other documents or any other record of any type whatsoever, or copies thereof which are in the custody, possession or control of the legal practitioner or law firm and which may be relevant to or relate to the complaint under section 99 or the investigation under section 100.

3. When there has been a failure by the practitioner to respond to the section 106 notice, then the Registrar is empowered to issue a notice pursuant to section 108 warning that such practitioner will be liable to be dealt with for professional misconduct which states 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 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 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]*

4. Thus, when there has been no response to the initial notice under s.106, the Registrar is empowered then to issue a second notice pursuant to section 108(1) which is in effect a warning that if the failure continues for a further 14 days from receipt by the practitioner of the second notice, the practitioner is liable to be dealt with for **professional misconduct**.
5. If the practitioner still fails to respond after 14 days from receipt by the practitioner of the second notice, then pursuant to section 108(2) such failure shall be **deemed** to be professional misconduct unless the legal practitioner or law firm furnishes a reasonable explanation for such failure.

What is professional misconduct?

6. Sections 82(1)(a) and 83(1)(g) of the LPA state as follows:

82.—(1) *For the purposes of this Decree, 'professional misconduct' includes –*
(a) unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, if the conduct

involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence;'

and

'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 Decree:

...

*(g) conduct of a legal practitioner or law firm in failing to comply with any orders or directions of the Registrar or the Commission under this Act'.
[emphasis added]*

7. If I was to sum up these charges it is the omission of failure to respond in a timely manner to the notice issued by the Chief Registrar pursuant to s.108(1) of the LPA that is the basis of alleging professional misconduct. These are simply allegations of professional misconduct pursuant to sections 82(1)(a), 83(1)(g) and/or 108(2) of the LPA, that there has been a failure to respond by the legal practitioner to the notice issued by Chief Registrar pursuant to s.108(1) of the LPA, that is, to provide a sufficient and satisfactory explanation in writing or produce such documents which is **deemed** to be professional misconduct pursuant to section 108(2).

What is the import of the deeming provision in section 108(2)?

8. Section 108(2) incorporates a deeming provision by which such failure to provide a sufficient and satisfactory explanation in writing or produce such documents is deemed or presumed to be professional misconduct. The term "deem" is often associated with statutory provisions which declare that one fact shall be "deemed" or "presumed" (the "presumed fact") on proof of another fact (the "basic fact"). Presumptions in this sense are frequently accompanied by rebuttal clauses that stipulate how the presumed fact can be displaced.
9. As Section 108(2) deem the failure to be professional misconduct and when the fact of the failure to respond to a notice received (the "basic fact") is proved or admitted, the fact of committing professional misconduct (the "presumed fact") is *ipso facto* is presumed. However, this provision contains a rebuttal clause namely *the furnishing of*

a reasonable explanation for such failure, by the proof of which the presumed fact can be displaced.

10. Where the basic fact is treated as sufficient proof of the presumed fact in the absence of evidence to the contrary, proof of the basic fact alone will be enough to support a finding that the presumed fact (professional misconduct) also exists. Hence, there is a persuasive burden (a "reverse onus") shifted to practitioner to rebut the statutory inference and displace the presumed fact of professional misconduct. To this end, the Practitioner must adduce proof of such a reasonable explanation on a balance of probabilities. (vide- *Collector of Customs v Murray* [1979] 1 N.Z.L.R. 76 (C.A.) at 82 per Cooke J.; *Esekielu v Department of Labour* [1980] 2 N.Z.L.R. 229 (C.A.) at 234 per Cooke J.)

11. As to what misconduct is, in *Re A (Barrister and Solicitor of Auckland)* - HC Auckland AP 59-SW01, (10 December 2001) at 50., the High Court New Zealand endorsed the following passage from *Corpus Juris Secundum*;

'Both in law and in ordinary speech the term 'misconduct' usually implies an act done willfully with a wrong intention, and conveys the idea of intentional wrongdoing. The term implies fault beyond the error of judgment; a wrongful intention, and not a mere error of judgment; ... Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences.'

12. This in my view will not apply to misconduct resulting from the failure to respond in view of the deeming clause of section 108(2). If there be no explanation then the consequence namely, the failure respond will *ipso facto* be deemed to be professional misconduct. If there be a reasonable explanation then the reverse process is set in motion and the deemed or the presumed fact can be rebutted and if so the nature of the conduct will determine if it is professional misconduct. However, in view of section 108(2) of the LPA even the lackadaisical disregard or negligence to respond will amount to professional misconduct if such practitioner fails to maintain the minimum standards of diligence and competence expected of a legal practitioner.

Summary of Evidence

13. The Applicant led the evidence of one witness, Mr. Avneel Chand, Legal Officer of the LPU. According to him the LPU has delivered two Notices to the Respondents' office and there had not been any response. However, on the 22nd of March 2021, an email was received from the First-named Respondent, Darshik Nair informing that the response had not been delivered due to an oversight, hence, seeking permission to bring it over to the LPU on the following day. The LPU has responded by email dated 23rd March 2021 acknowledging the receipt of the said email and informing that the response may be delivered to the office (LPU). The witness admitted the receipt of the response on the 25th of March 2021.
14. Three witnesses testified for the Respondents and they are: Mr. Darshik Nair (RW1), Mr. Shivam Prasad (RW2) and Ms. Shomal Kant (RW3). According to their evidence, RW3 was not in the office during this period and RW1 handled the day-to-day tasks of the law firm. The Respondents admit the receipt of the Notices and it is their position that response was prepared and handed over to the Clerk, RW2 for delivery. However, after the lapse of sometime, RW1 had enquired from RW2 and found out that the response had not been dropped off at the LPU as such RW2 had sent an email on the 22nd of March 2021 and that response had been delivered on the 25th of March 2021.
15. RW2 admits that a letter was handed over to him to be delivered to the LPU. However, he failed to deliver the same due to an oversight and delivered the same on the 25th of March 2021 to the LPU.
16. The receipt of the notices is admitted and common ground and the failure to respond by the due date is not denied. However, the Respondents advance a reason and excuse for the failure so to respond on the due date. It is common ground that RW1 did by email on the 22nd March 2021 inform the LPU his intention to tender the response, and in that email the reason for the failure to respond in a timely manner was also stated as being the forgetfulness of his staff and also inquired if the letter of response could be brought over to the LPU the following day. LPU by email dated 23rd March 2021 responded thus; "*Kindly take note that you can deliver the response to our office*". It is admitted and common ground that the letter of response was delivered on

the 25th March 2021 which was marked and produced as Exhibit R1. During the course of this inquiry, the Commission was informed that the substantive matter too had been finalized and sorted out between the virtual Complainant and the Respondents. This was confirmed by the Counsel appearing on behalf of the Chief Registrar on 22nd November 2022.

Evaluation

17. On the evaluation of the evidence in its totality, the fact of receiving notices as alleged is admitted and not in dispute. Failure to respond within the stipulated time is also common ground and not in dispute. That being so the deeming provision comes into operation and now it is deemed that the Respondents did in fact commit Professional misconduct as alleged. However, the Respondents have *furnished an explanation for such failure* and now it is to consider if it is reasonable.
18. There is no doubt that the failure to respond is admitted and is proved. There have been two notices. The issue is whether there was a deliberate attempt to disregard the notices and to remain without responding to the said Notices. The Respondents have on the 22nd of March conveyed by email of their failed attempt to respond and also their desire to respond. The LPU has in response informed their willingness to accept the response even subsequently. On the 25th the information requested was in fact delivered to the LPU.
19. The cause of the delay as explained is due to certain health issues of the Second-named Respondent, covid situation and the oversight of the delivery boy. This explanation furnished to this Commission is consistent with the email received by the LPU. In these circumstances it is certainly more probable than not that the Respondents have certainly made an attempt to respond but due the said circumstances it had not reached LPU on the due and expected date. No doubt, it is the responsibility of the Practitioner to ensure the timely delivery of the response to the LPU. The oversight or negligence of the Clerk of the Respondents is no excuse and such lapse will *per se* be attributed to the Practitioner. It was the Practitioner's duty and obligation to follow up and ensure the due delivery of such response.

20. By virtue of the presumption in section 108 (2) the failure within the stipulated time to respond will be deemed to be professional misconduct. In view of this deeming provision with the failure to make a timely response it shall be presumed that the Respondent practitioners have committed professional misconduct. However, section 108 contains a reverse onus by which if the practitioner furnishes a reasonable explanation for such failure the presumed fact can be rebutted. In the present application the respondents provide an explanation as for the Second-named Respondent, Shomal Kant was not actively involved in the day-to-day activities and running of the law firm. The First-named Respondent, Darshik Nair admits that he was in charge and was attending to the day-to-day affairs of the law firm, including accepting notices received by them.
21. The reason for the Second-named Respondent to be away from the affairs of the law firm have been due to her ill-health which is supported by the medical certificate dated 25th March, 2021. The fact that the Second-named Respondent was not attending to the day-to-day activities is also stated in the letter dated 20th April, 2021 written to the Chief Registrar. The fact of she been admitted to hospital for a gynecological procedure on 27th November, 2020 and the continuing health issues which lasted for about 6 months had been explained in that letter. This was led in evidence and the said letter along with annexures was produced as exhibit R2. This evidence remains unchallenged.
22. The First-named Respondent admits that he was handling single handedly the day-to-day affairs of the law firm. In these circumstances, in the first instance the Second-named Respondent has furnished an explanation which explains reasonable grounds for her inability to make a timely response. Secondly, Mr. Darshik Nair provides an explanation namely the oversight of his office delivery boy. No doubt by the 22nd March, 2021 the stipulated time had expired. As such the presumption in section 108 (2) comes into operation and it shall be deemed upon the proof of such failure that the Respondent Practitioner did commit professional misconduct as alleged. Now the explanation comes into place. There is a reasonable explanation then the presumed fact can be rebutted.

23. As mentioned above the Respondents have on the 22nd March, 2021 promptly by email communicated the lapse on their part to make a timely response and informed of their desire to respond and provide the necessary documents. This preceded and was prior to the filing of this application. This conduct clearly establishes the *bona fide* intention of the Respondents to respond to the notices. No doubt there was a delay. However, on the 23rd March in response to the said email informed that, *their response may be delivered to the office*. These circumstances and evidence will clearly establish two facts. Firstly, promptly explaining the delay. Secondly, and the fact of time being sought or an extension requested for by the Respondents and though not stated directly in that form the LPU too had agreed to accept a delayed delivery of the response. To my mind this amounts to the granting of extension of time and the Respondents have within 2 days there of on the 25th of March 2021 handed over the response to the LPU which is admitted and common ground.

Conclusion

24. In the afore circumstances on the one hand the explanation furnished is reasonable and on the other hand as there is tacit extension of time, I am of the view that the Respondent Practitioners cannot be held liable to the charges of professional misconduct based on the alleged failure to respond. In these circumstances, I am unable to conclude that there was a failure to respond as contemplated by Section 108 (2) of the LPA. Accordingly, this Commission is of the view that the Applicant has failed to satisfy this Commission of the ingredients of and prove both the allegations as charged and accordingly hold that the Applicant has failed to prove the allegations preferred against both the Respondents separately.

25. Accordingly, both the Respondents are discharged from these proceedings.

Dated the 5th day of January, 2023.


Justice Gihan Kulathunga
Commissioner

