

IN THE INDEPENDENT LEGAL SERVICES COMMISSION

AT SUVA

ILSC CASE NO. 010 of 2021

BETWEEN: CHIEF REGISTRAR

APPLICANT

AND KEVUELI TUNIDAU

RESPONDENT

Counsel: Ms. J. Sharma for the Applicant

No Appearance

Date of Hearing (Pleading) : 27 May and 3 June 2022

Written submissions : 22 June 2022

Date of Judgment : 27 February 2023

DETERMINATION

Introduction

1. The Chief Registrar in this application filed against the Practitioner Mr. Kevueli Tunidau preferred the following three allegations by:

COUNT 1

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

PARTICULARS

KEVUELI TUNIDAU, legal practitioner, being the principal of KEVUELI TUNIDAU LAWYERS and trustee of KEVUELI TUNIDAU LAWYERS Trust Account kept with the ANZ bank based at Lautoka branch bearing the account number 11213916, failed to ensure, that the trust monies in the sum of \$105,000 received on 20th November 2018 via Lotus Foreign Exchange from his client namely, KALIM HUSSAIN for the purpose of making payment for purchasing a land being TLTB 4/7/41257, were not utilized for unauthorized purposes, which conduct constitutes professional misconduct pursuant to section 82 (1) (b) of the Legal Practitioners Act 2009.

COUNT 2

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

PARTICULARS

KEVUELI TUNIDAU, legal practitioner, being the principal of KEVUELI TUNIDAU LAWYERS and trustee of KEVUELI TUNIDAU LAWYERS Trust Account kept with the ANZ bank based at Lautoka branch bearing the account number 11213916, failed to ensure that his client namely KALIM HUSSAIN'S funds held in the Trust Account consisting of the sum of \$105,000, was not overdrawn which conduct constitutes professional misconduct pursuant to section 82 (1) (b) of the Legal Practitioners Act 2009.

COUNT 3

PROFESSIONAL MISCONDUCT: *Contrary to Section 82(1) (a) of the Legal Practitioners Act 2009*

PARTICULARS

KEVUELI TUNIDAU, legal practitioner, being the principal of KEVUELI TUNIDAU LAWYERS failed to respond to a Notice dated 21st April 2021, pursuant to section 105 (2) of the Legal Practitioners Act 2009 and thereafter failed to respond to a subsequent reminder Notice dated 21st May 2021, issued by the Chief Registrar pursuant to section 108(1) of the Legal Practitioners Act 2009, which conduct is a breach of section 108(2) of the Legal Practitioners Act 2009 and is an act of professional misconduct.

2. This application was filed on the 9th September, 2021. A copy of the application and bundle of disclosures have been personally served on the Respondent practitioner on the 10th November, 2021. This Commission via email forwarded the Notice of adjournment to the Respondent and mentioned this matter on the 30th November, 2021. The Respondent was absent on that day. When mentioned on 7th April, 2022 the Respondent was absent despite being informed by emails dated 23rd March, 2022 and 18th March, 2022 by this Commission. The Chief Registrar too informed the Respondent of the dates adjourned. As such the matter was set for hearing for the 27th of May, 2022. The Notice of adjournment for the said day had been personally served on the Respondent practitioner Mr. Tunidau on the 24th May, 2022. This fact is confirmed by the affidavit of service filed on 26th May, 2022. According to which Mr. Tunidau had duly signed and accepted the said Notice. However, when this matter was mentioned on the 23rd May, 2022 the Respondent was absent but did

inform the Applicant's Counsel that he was not well but no intimation was made to this Commission. The matter was taken up for trial on the 27th May, 2022 on which day the Respondent was provided with the opportunity and option to participate in these proceedings via skype. The Respondent did not acknowledge in or respond to this offer or facility. Accordingly, the inquiry proceeded in the Applicant's absence in accordance with the provisions of section 112(4) of the Legal Practitioners Act. (Henceforth will be also referred to as the Legal Practitioners Act)

3. Upon concluding the inquiry, the Applicant's closing written submission was filed on the 22nd June, 2022 and the matter was set for determination. Subsequently, Notices were issued on the Respondent informing him of the dates adjourned. However, as he continued to absent himself the determination was set for the 27th February, 2023. Accordingly, I proceed now to pronounce this determination.
4. Allegations in counts 1 and 2 are in respect of irregularities of the Trust Account of Kevueli Tunidau Lawyers with ANZ Bank Lautoka branch bearing account number 11213916. Count No. 1 alleges that the Respondent practitioner as the sole partner of the law firm and the Trustee, failed to ensure a sum of \$105,000 received on 20th November, 2018 from Kalim Hussein for the purposes of making payment for purchasing/leasing a land being TLTB 4/7/41257, was not utilized for unauthorized purposes.
5. Second allegation is that the practitioner failed to ensure that client Kalim Hussein's fund held in the Trust Account in a sum of \$105,000 was not overdrawn. These being the two allegations it is necessary to establish that the Respondent was the

Trustee of the said Trust Account; that a sum of \$105,000 was received from the client Kalim Hussain for the said purpose and that the Respondent has overdrawn the said account as alleged. When the fact of overdrawing is established *ipso facto* the unauthorized utilization is proved unless proper authorization is proved.

6. Allegation in count No. 3 is the failure to respond in a timely manner to the notice sent under section 108 of the Legal Practitioners Act. Acts alleged in counts 1 and 2 in the allegations should amount to professional misconduct within the meaning of Sections 82(1) (a). Acts alleged in allegation 3 should amount to Professional misconduct within the meaning of Sections 82(1) (b) for counts Nos. 1 and 2.

What is Professional Misconduct?

7. As for counts 1 and 2 '*professional misconduct*' is based on Sections 82(1)(b), 83(1)(h) and as for count 3 '*professional misconduct*' is based on Sections 82(1)(a), 83(1)(g) of the LPA. Sections 82(1)(a)&(b), 83(1)(g) and 83(1)(h) of the LPA are as follows:

82.—(1) For the purposes of this Act, '*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;*

(b) *conduct of a legal practitioner, whether occurring in connection with the practice of law or occurring otherwise than in connection with the*

practice of law, that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

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:

(a)

(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]

(h) conduct of a legal practitioner or law firm consisting of a **contravention of the provisions of the Trust Accounts Act 1996** (emphasis added);

The Statutory Basis of the Allegations in Counts 1 and 2

8. As for the charges of the failure to ensure that funds were not utilized for unauthorized purposes (count 1) and the failure to ensure that the trust account was not over drawn (count 2) they are based on the contraventions of the provision of section 6 of the Trust Accounts Act. Section 6 of the **Trust Accounts Act 1996** provides that:

*6 (1) A trustee shall not withdraw moneys from a **trust account** except for the following purposes:-*

- (a) *payment to the person on whose behalf the moneys are held with that person's directions;*
- (b) *payment to the trustee of disbursements properly paid by the trustee on behalf of the client in question Disbursements shall be deemed to have been paid on the day the cheque in payment of the disbursement has left the possession and control of the trustee, and the trustee has no reason to believe that the cheque will not be paid on presentation;*
- (c) *payment to the trust for professional costs in the following circumstances:-*
 - (i) *where the payment is supported by authorisation in writing by the person on whose behalf the moneys are held. Where the authorisation is not specific as to the amount to be paid, the trustees shall forward an account to the client in question prior to making such payment;*
 - (ii) *in payment of an account which has been delivered to the client and at the expiration of 30 days after delivery no evidence exists of any objection by the client to the quantum thereof,'*
 - (iii) *where payments in the trust account were received by the trustee in payment or part payment of an account previously rendered to the client in question*
- (d) *payment that is otherwise authorised by statute or made pursuant to an order of the Court.*

9. If I may put it simply when the balance in the trust account falls below the amount that should be held in trust on behalf of the clients then it is overdrawn. Such over drawing will necessarily lead to the inference that the trustee has made

disbursements over and above the sum held in trust for the client/s and the absence of authority by the client will necessarily prove that such overdrawn sum was unauthorized. These are the allegations of professional misconduct pursuant to sections 82(1)(b) read with 83(1)(h) of the LPA and section 6 of the **Trust Accounts Act**.

Fit and proper person

10. Allegations of misconduct in counts 1 and 2 based on section 82(1)(b) of the LPA requires proof that the alleged conduct is such that the practitioner is not a fit and proper person to engage in legal practice. Professional misconduct under section 82(1)(b) of the LPA includes conduct that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice. This provision includes the situation where the conduct occurred otherwise than in connection with the practice of the law as well. Section 82(2) provides, that in determining if a practitioner is not a fit and proper person regard may be had to the suitability matters governing admission or the grant or renewal of the practising certificate including section 44 of the LPA. The suitability matters as defined in section 44(1) *inter alia includes the failure to comply with any law relating to Trust funds [vide section 44(1)(c)]* and such matters as whether the person is currently of good fame and character, or is or has been insolvent under administration, or has been convicted of an offence and its circumstances, or is currently unable to carry out the inherent requirements of practice.

The Statutory Basis of the Allegation/Charge of Failure to Respond (Count No. 3)

11. Upon the receipt of a complaint or commencement of an investigation against a practitioner, section 104 of the Legal Practitioners Act 2009 requires the Registrar 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 105 of the LPA, the Registrar is empowered to require the practitioner to furnish a satisfactory explanation in writing or explanation in relation to any matter relating to that Practitioner's conduct or practice; and section 106 of the LPA, empowers the Registrar to require the production of documents. Sections 105 and 106 of the LPA are as follows:

Sections 105;

Registrar may require explanation

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

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

Sections 106;

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.

12. When there has been a failure by the practitioner to respond to the section 105 or 106 notice as the case may be, then the Chief 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]

13. Thus, when there has been no response to the initial notice under s.106, the Chief Registrar is empowered then to issue a second notice pursuant to section 108(1) which is in effect is a warning that if the failure continues beyond 14 days from thereof the practitioner is liable to be dealt with for professional misconduct.
14. 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 the import of the *deeming* provision in section 108(2)?

15. 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.

16. Section 108(2) deems the failure, to respond as being professional misconduct When the fact of such 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 presumed. However, this provision contains a rebuttal clause namely the furnishing of a reasonable explanation for such failure by of which the presumed fact can be displaced.

17. 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 sufficient to support the finding that the presumed fact (professional misconduct) 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 upon the proof of the basic fact. 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.)

18. 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.'

19. 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 to respond will deem it 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 Legal Practitioners Act 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.

20. Now if I was to sum up the charge of failure to respond (count 3) 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. This is simply an allegation of professional misconduct pursuant to sections 82(1)(a), 83(1)(g) read with 108(2) of the LPA, on a failure to respond by the legal practitioner to notice issued by Chief Registrar pursuant to s.108(1) of the Legal Practitioners Act, which is deemed to be professional misconduct pursuant to section 108(2).

The Standard of Proof

21. As set out in the Hong Kong case of **A Solicitor v Law Society of H.K.** [2008]2HKLRD and endorsed in **Chief Registrar V Adish Kumar Narayan**, ILSC NO. 009 of 2013 (2nd October 2014) and adopted by this Commission in **Haroon Ali Shah** [007 of 2011] evidentiary test in professional disciplinary matters will be as follows;

"The test is not proof beyond reasonable doubt, but a varying standard of the civil standard referred to at times as the preponderance of probabilities. The more serious an act or omission alleged the more improbable it must be regarded and in proportion to the improbability the evidence will need to be more compelling". (emphasis added)

Summary of Evidence

22. The Applicant called 4 witnesses namely Mr. Kalim Hussein (the complainant), Mr. Wahid Hussein (his brother), Mr. Ponipate Turuva (the lessor of the land) and Mr. Meli Laliqavoka, Ms. Tulia Rewarewa, Ms. Alpana Kumar (officer from the LPU) and Mr. Melvin Kumar (officer from the LPU).
23. According to the evidence of the Complainant Mr. Kalim and his brother Wahid the following facts transpired. Kalim has transferred a sum of dollars \$105,000 to the Respondent's Law firm's Trust Account via telegraphic transfer to be deposited into Kevueli Tunidau Lawyers Trust Account on 20th November, 2018. The purpose was to pay Mr. Turuva the purchase price of the proposed land transfer.
24. The Respondent's services have been obtained by Mr. Kalim. He has on the first meeting paid a sum of \$500 to the Respondent as his fee and signed the purchase

agreement (Exhibit PE1). Then the transfer of title also was executed and signed on the same day. Of the total purchase value of \$125,000 Kalim has paid \$20,000 to Mr. Turuva and the Respondent has instructed that sum of \$105,000 be transferred to his Trust Account. Mr. Kalim had transferred the said sum from his overseas bank account by way of swift transfer (Exhibit PE2). Thereafter, when the Respondent was connected, he had informed of some difficulty in releasing the purchase price as instructed in view of an alleged fraud in relation to this transfer at the TLTB end. Mr. Kalim had visited the TLTB and found that it was an internal matter and not directly connected to their transfer. He had made several attempts to contact the Respondent but has not been successful. When he visited the TLTB he had been instructed to pay \$45,000 which he paid and the said land had been transferred to his name. Mr. Kalim has paid the said sum out of his own money.

25. After the said transfer he had made requests to the respondent for the release of his money to pay Mr. Turuva. He has made several attempts to call the Respondent from his phone but Mr. Tunidau has not responded (not answered). However, when he called the Respondent using a different phone of a friend, the Respondent had promptly answered. On that occasion he had informed the Respondent that a sum of \$45,000 was paid to the TLTB and requested him to return the \$105,000. The Respondent has then mentioned of an ongoing TLTB investigation and refused to pay the money. Accordingly, Mr. Kalim had lodged this complaint with the LPU on the 19th August, 2019 (Exhibit PE3).
26. He confirms the receipt of the deed of lease for 99 years. However, his allegation is that the Respondent Mr. Tunidau has not released the funds and is requesting that an

order be made for the release of the said \$105,000 and the same to be paid to Mr. Turuva. The evidence of his brother Mr. Wahid corroborates much of the above facts.

27. Witness no. 3 Mr. Ponipate Turuva states that he resides at Lautoka and wanted to lease out two plots of land for \$125,000 each and in respect of the first transaction Mr. Kalim deposited \$105,000 with Mr. Tunidau. However, even after the transfer was effected the said sum of \$105,000 had not been released to him. Mr. Turuva has been visiting the Respondent sometimes even twice a week and requested for the money. However, Mr. Tunidau has refused and then not spoken to him. His complaint is that several years he has been waiting to receive his sale proceeds and request that he be paid the said sum of \$105,000.

28. Mr. Meli Laliqavoka from the LPU has investigated the Trust Account aspect of this complaint. Initially he had requested the Respondent to provide him with a copy of the (Trust Account) Bank Statement of the from 01st July, 2018 (Exhibit PE8). The Respondent has not provided the statement for the relevant period. Then he has obtained the bank statement for the period 01st October, 2019 to 04th March, 2021 directly from the ANZ Bank). According to which the balance as at 19th March, 2020 has dropped to \$98,307 and continued to remain below \$105,000 up until the end of November 2020 (Exhibit PE11). According to the covering letter the said account number is 11213916 and the said bank statement gives the name of the account holder as Kevueli Tunidau Lawyers Trust and the type of account is Canbi Business and Non-Consumer. This witness has also received a copy of the auditor's report of the said Trust Account for the year ending on the 30th September, 2019 (Exhibit

PE10). According to which until the end of September 2019 the said Trust Account has not been overdrawn. In view of the said material this witness has found that the Trust Account funds between the period of March 2020 and November 2020 has gone below \$105,000 and accordingly the Trust Account has been overdrawn and the \$105,000 or part thereof in the Trust Fund in favor of Mr. Kalim Hussein has been utilized for an unauthorized purpose.

29. Witness No. 5 Tulia Rewarewa an officer from the Legal Practitioners Unit confirms the receipt of the complaint and at the initial stages the Respondent Mr. Tunidau was informed of the same and the respondent had provided a detail explanation as to why he was not releasing the said sum of \$105,000 deposited into his Trust Account (Exhibit PE14). Mr. Tunidau in the said letter admits that a sum of \$105,015 was received into his Trust Account on the 20th November, 2018 from Mr. Kalim via Swift transfer (Paragraph 8 of PE14). He also admits that the said sum is there in his Trust Account. Thus, as at 31st December, 2019 the Respondent admits that the said sum of \$105,000 was in the Trust Fund (Paragraph 26 of PE14).
30. As it transpired that the Trust Account was overdrawn during specific periods, the LPU has sent out the Notice under Section 105(2) dated 21st April, 2021 to the Respondent. This Notice has been sent by email to ktunidau@yahoo.com.au. She had not received any response to the said Notice.
31. Witness No. 6 is an officer of the Legal Practitioners Unit Ms. Alpana Kumar. She had prepared and sent the Notice under Section 108 of the Legal Practitioner's Act dated 30th April, 2021. The same has been sent an email to ktunidau@yahoo.com.au

and also posted to the postal address of Mr. Tunidau. There had been no response to the said Notice and in view of the Covid situation another Notice dated 21st May, 2021 under section 108 has once again been served by email and personal delivery (Exhibit A20). Further there to personal delivery has been effected through the Sherriff Officer of High Court of Lautoka who has confirmed that the said Notice was served on and accepted by Mr. Tunidau on the 02nd June, 2021 at 3pm (the confirmation of delivery document was marked and produced as exhibit A23). There had been no response to this Notice either

32. Finally witness No. 7 Mr. Melvin Kumar an officer from the Legal Practitioners Unit was called and according to him the Notice under Section 108 (exhibit A20) was sent to the Lautoka Court registry and had been hand delivered personally to the Respondent and in proof of which exhibit A20 the delivery document was produced. This was further confirmed by the delivery docket exhibit A23. This witness confirms that there was no response to this Notice either.

Analysis of the Evidence

Allegations in Counts 1 and 2

33. According to the evidence Mr. Tunidau was a Legal Practitioner in the last application made for the renewal of his Practicing Certificate dated 25th February, 2020 his details are found Exhibit A24. According to which he has been Principle Legal Officer of Tunidau Lawyers and the Trustee of Account number 11213916 being the trust Account of the said law firm. Mr. Tunidau in his response dated 31st December, 2019 admits that he received a sum of \$105,015 on the 20th November, 2018 from Mr. Kalim by way of Swift transfer as a part of the purchase price for a

lease; paragraph 8 of Exhibit A14. Mr. Kalim's evidence establishes that the said sum of \$105,000 so deposited in the Respondent's Trust Account was not released to him or paid to the vendor/lessee Mr. Turuva. The bank statement exhibit A11 confirms that the bank balance of the Trust Account has gone below \$105,000 between 9th March, 2020 and the 16th November, 2020 (exhibit A11). This sum of \$105,000 was specifically deposited to the Trust Account to meet the purchase price of the land bearing TLTB 4/7/41257. The entering into the transfer/agreement for lease is confirmed by PE13 and is admitted by the Respondent at exhibit A14 (paragraph 3), the letter sent by the Respondent at the outset.

34. This sum of \$105,000 should have remained in the Trust Account and to be specific in the ledger in favor of Mr. Kalim. The fact of the bank balance of the Trust Account falling below \$105,000 per say, in so facts proves that the said Trust Account has been overdrawn. According to Mr. Kalim the only instruction given was to pay the said sum to Mr. Turuva. Mr. Turuva confirms that he did not receive any such payment despite making several attempts to obtain the same from the Respondent. Mr. Tunidau in his letter dated 31st December, 2019 (exhibit A14) admits that he did not release the whole or part of this sum and he would not release this amount except on an order made by High Court (paragraph 26 of exhibit A14). That been so it is clearly proved on a very high degree of probabilities that in said sum of \$105,000 was deposited in the Trust Fund of Kevueli Tunidau Lawyers. It is also proved that the said Trust Fund has been overdrawn and the sum so overdrawn has not been utilized in whole or a part for the purpose it was deposited. Mr. Tunidau is the trustee and Mr. Kalim has not authorized any payment.

35. As the overdrawn is established and there is no rational explanation for the Respondent's conduct, the only possible inferences that may be drawn, are:
- a). That he knowingly used trust monies for the purposes of his office account; or
 - b). That he was recklessly indifferent as to what happened to his clients' funds; safeguarding their funds; and the use of their funds.
 - c). Either it is misconduct and the Respondent is culpable and liable.

36. In The Law Society of New South Wales v Jones (NSW Court of Appeal, decision dated 24 July 1978) in which Street CJ stated:

“Reliability and integrity in the handling of trust funds are fundamental prerequisites in determining whether an individual is a fit and proper person to be entrusted with the responsibilities belonging to a solicitor. Members of the public, many of them wholly inexperienced and unskilled in matters of business or of law, inevitably must put great faith and trust in the honesty of solicitors in the handling of monies on their behalf. The Court must ensure that this trust is not misplaced. It is in recognition of this duty upon the Court that I have reached the conclusion that the finding of the Statutory Committee in this case fell short of what was required in the light of the repeated and long-standing defalcations and the subsequent conduct of the present respondent.”

37. There is ample judicial authority that trust account matters are amongst those most damaging to public confidence. *Reliability and integrity in the handling of trust funds are fundamental prerequisites in determining whether an individual is a fit and proper person to be entrusted with the responsibilities belonging to a solicitor. Members of the public, many of them wholly inexperienced and unskilled in matters of business or of law, inevitably must put*

great faith and trust in the honesty of solicitors in the handling of moneys on their behalf. The Court must ensure that this trust is not misplaced. (Law Society of New South Wales v Jones).

38. In the said premises, I am satisfied upon considering the evidence that the Respondent is at least grossly negligent with regards to compliance with and in maintaining the trust account of which he was the trustee. This lapse has resulted in the significant overdrawn and trust account deficit over a period of time. This certainly put members of the public at risk. This transgression, objectively viewed, justify the conclusion and I am satisfied that Respondent is not a fit and proper person to engage in legal practice or operate a law firm.
39. In the above circumstances I am satisfied that allegations of professional misconduct made in counts 1 and 2 have been proved on the required high civil standard. Thus, the Commission after reviewing the evidence presented by the counsel for the Chief Registrar finds that the said two allegations in counts 1 and 2 are established.

Allegation in Count 3

40. Now to consider the allegation in count No. 3. Notice dated 21st April, 2021 under section 105 (2) and the Notice dated 30th April, 2021 under Section 108 have been sent by email. These are confirmed by exhibit A16 and exhibit A18. The subsequent Notice under section 108 dated 21st May, 2021 has been sent by email but it wasn't delivered and returned as the address could not be found (vide - Exhibit A21). However, the LPU has delivered the said Notice by the Sherriff Officer of the Lautoka High Court who has confirmed the personal delivery by the delivery as evident document exhibit A23. Whilst the delivery is confirmed to have been made on 2.6.2021 the recipient Mr. Tunidau has personally signed and acknowledge the receipt of the Section 108 Notice dated 21st May, 2021 as well as copies of

the Section 105 (2) Notice dated 21.4.21 along with the Section 108 Notice dated 30th April, 2021.

41. The evidence presented by the Complainant proves on a balance of probabilities that the Respondent Practitioner has failed to respond as required within 14 days of or any time thereafter of the receipt of the second notice dated 21st May 2021. Thus pursuant to section 108(2) such failure is then *deemed* to be professional misconduct unless the legal practitioner or law firm furnishes a reasonable explanation for such failure. In the absence of such explanation the only and irresistible conclusion possible is that the respondent has committed professional misconduct within the meaning of section 82(1)(a) of the LPA.
42. In the above circumstances I am satisfied that allegation of professional misconduct made in count 3 has been proved on the required high civil standard. Thus, the Commission after reviewing the evidence presented by the counsel for the Chief Registrar finds that the said allegation of failure to respond in count 3 is established.
43. Accordingly I find that all 3 allegations made in counts 1, 2 and 3 are proved and find the Practitioner culpable and liable for the same.




Gihan Kulatunga
Commissioner