

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 001/2010

BETWEEN: CHIEF REGISTRAR

Applicant

A N D: HAROON ALI SHAH

Respondent

Applicant: Ms V. Lidise & Mr A. Chand

Respondent: Ms N Khan

Date of Hearing: 15th, 16th, 20th, 21st, 22nd, 23rd, 24th September 2010

Date of Judgment: 30 September 2010

JUDGMENT

1. The complaint in this matter is particularised as follows:

Haroon Ali Shah a legal practitioner, on the 6th of June 2005 was convicted for the criminal offences of assault occasioning actual bodily harm and damaging property at the Lautoka Magistrates Court in the proceedings State v Haroon Ali Shah Criminal Case No. 227 of 2005, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

2. The Applicant relies on the record of the Magistrate Court, the Magistrate's judgment and judgment on sentence together with the judgment of Winter J who dealt with the Respondent's appeal as to conviction and sentence.
3. The Respondent gave evidence before the Commission.
4. There is no issue that the Respondent was convicted on the 6th of June 2005 of assault occasioning actual bodily harm and damaging property. The offences having been committed on the 14th of February 2005.
5. The facts as they appear from the records of the Magistrate's court [Ex A1] are that on the 14th of February 2005 the Respondent appeared before the High Court Lautoka to represent Sati Prasad the father of Saten Singh. The lawyer acting for Saten Singh, Mr Iqbal Khan, sought that the proceedings been adjourned which was opposed. The

matter was stood down and the parties and their lawyers were encouraged to seek a resolution of the dispute between father and son.

6. Outside the court room but within the precincts of the court Saten Singh approached the Respondent in the absence of his counsel. There was an exchange of words which resulted in Saten Singh being pushed and punched by the Respondent. Saten Singh had his glasses in his shirt pocket and they were broken.
7. Saten Singh on the advice of his counsel reported the matter to the Police and attended Lautoka hospital.

8. The Resident Magistrate in her judgment said ...

"For an assault occasioning actual bodily harm, the injuries suffered by the complainant are at the lower end of the scale. There is also no doubt that the accused was significantly provoked by the complainant who, in a public place, loudly cast serious aspersions on his good character."

9. The Respondent was on 6th of June 2005 fined the sum of \$1,000 on the charge of assault occasioning actual bodily harm and \$500 on the charge of damaging property.
10. The Respondent appealed the conviction and sentence and on the 20th of October 2006 Winter J dismissed the appeal [Ex A2].
11. The Respondent in his evidence before the Commission says that Saten Singh approached him in the absence of his counsel, poked him in the chest, called him a crook and said that the Respondent was taking advantage of his father who was going to die anyway and that he hoped he would disappear from the face of the earth.
12. The Respondent says his client was 83 years of age and his age was the reason for opposing the application for adjournment on that day.

PROFESSIONAL MISCONDUCT

13. Section 82 defines professional misconduct as follow:-

"(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; or*
- (b) Conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or*

occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the legal practitioner is not a fit and proper person to engage in legal practice, or that law firm is not fit and proper to operate a law firm.

(2) For the purpose of finding that a legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regards may be had to the matters that would be considered if the practitioner were an application for admission or for the grant or renewal of practising certificate, including those matters contained in section 44 (a) - (j) of this Decree."

14. Before looking at s.44 it is necessary to look at s.83 (1)(d)(i) which states:-

"(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:

(d) Conduct in respect of which there is a finding of guilt or conviction for:
(i) A criminal offence (excluding traffic offences);"

15. If it is submitted on behalf of the Applicant that 'is capable' is to be read as 'if proved' and not merely as an enabling provision.

16. Section 44 (b) provides:-

"(b) has been convicted in the Fiji Islands or elsewhere of an offence which involves moral turpitude or fraud on his or her part;

17. S.82 (2) does not however limit the matters that may lead to the conclusion that a legal practitioner is not a fit and proper person to engage in legal practice to those listed in s.44.

18. A conviction therefore for a criminal offence whether involving moral turpitude or not is conduct capable of being professional misconduct.

19. The conviction would amount to professional misconduct if the conduct was such as to 'justify a finding that the practitioner is not a fit and proper person to engage in legal practice' and if such a finding could not be justified and if the conduct occurs in connection with the practice of law and if the conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner that conduct maybe found to be unsatisfactory professional conduct.

20. The result of the operation of these sections is that there are three separate categories:-

1. Unsatisfactory professional conduct under section 81;

- II. Professional misconduct being unsatisfactory professional conduct involving a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence under s.82 (1)(a);
 - III. Professional misconduct where the conduct justifies of finding that the legal practitioner is not a fit and proper person to engage in legal practice s.82 (1)(b).
21. It might seem that a finding pursuant to s.82 (1)(b) would require that the practitioners name be removed from the roll. However this is not so as is pointed out in New South Wales Bar Association v Bryson [2003] NSWADT 19 at 55

"The first of those factors is that the phrase used in the relevant part of the definition of s.127(b) is that the conduct 'would justify' a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners. The conduct may be such that it would justify such a finding although it does not lead to one. For example, it may be that conduct occurring twenty years ago would justify a finding that a legal practitioner was not of good fame and character (at the time) but such a finding would not necessarily lead to a finding of present incapacity.

The second reason why the submission must be rejected is that the concepts of 'not of good fame and character' and 'not a fit and proper person to remain on the roll of legal practitioners' are not only highly subjective but also part of a continuum. Conduct may clearly justify a finding that a legal practitioner is not of good fame and character. Other conduct may not justify such a finding. Conduct may justify such a finding by the narrowest of margins; other conduct may fall short of justifying such a finding that a legal practitioner is not of good fame and character and conduct that would not and there is no bright line between conduct which would justify a finding that a practitioner is not a fit and proper person to remain on the roll of legal practitioners and conduct that would not. This means that a tribunal may quite properly find that conduct would justify such a finding but not make it, in much the same way as a trial judge in a damages claim may conclude that the evidence 'would justify' a verdict in the range of \$100,000.00 - \$120,000.00 but pronounce a verdict for, say \$110,000.00.

To these propositions must be added the provisions of sub-section 171C(1) of the Legal Profession Act which provides for a range of possible orders ranging from removal from the roll to a private reprimand. All the orders referred to in that sub-section are orders which can be made if the Tribunal is satisfied that the legal practitioner is guilty of professional misconduct or unsatisfactory professional conduct. A suggestion that only one of the orders is available if a legal practitioner is guilty of professional misconduct is not open on a fair reading of the sub-section."

22. S.82 (1)(b) is relevantly in terms identical to those considered in Bryson and s.171C(1) is similar to s.121.
23. The effect therefore is that a finding based on s.82 (1)(b) still leaves open a consideration of the penalties pursuant to s.121 of the Decree.

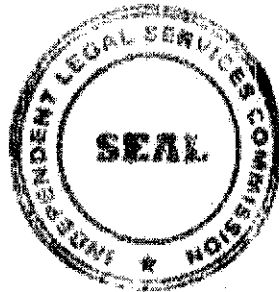
CONCLUSION

24. The Respondent has been convicted of assaulting his opponent's client in the precinct of the court after provocation by that person.
25. The assault was at the bottom of the range, the injuries were not serious and the damage was not great **BUT** it is not possible to lose sight of the fact that a lawyer, an officer of the court, assaulted a party to the proceedings in the precinct of the court however minor the assault might have been.
26. The incident occurred over five and a half years ago and the Respondent is only now facing disciplinary proceedings due to circumstance outside his control and outside the control of this Commission.
27. Does the conduct five and a half years ago justify a finding now that the Respondent is not a fit and proper person to engage in legal practice or does the conduct five and a half years ago involve a substantial failure to maintain a reasonable standard of competence and diligence?
28. The conduct is not such, in my opinion, as to fall within the definition of unsatisfactory professional conduct in section 81 being merely conduct falling short of the standard of competence and diligence that a member of the public is entitled to expect. It is by virtue of the person assaulted, the location and the circumstances of the assault more serious than that section envisages.
29. Competence and diligence in s.81 and s.82 (1)(a) refer to the timely and skilful performance of a given task.
30. The Concise Oxford Dictionary defines 'diligence' to mean 'care and conscientiousness in one's work' and it defines 'competence' as 'having the necessary skill or knowledge to do something successfully'.
31. These words are defining conduct that falls in a very different category to assault. They are consumer based requirements of professional practice rather than requirements as to personal conduct.
32. I am of the opinion that the conduct of the Respondent justifies a finding that he was not a fit and proper person to engage in legal practice and therefore I find him guilty of professional misconduct.
33. I leave open to further submission the appropriate penalty that should be imposed on the Respondent.

34. I adjourn the proceedings until 2.00 pm today to hear submissions as to the penalty that should be imposed.

ORDERS

1. The Respondent is found guilty of professional misconduct.
2. The proceedings are adjourned until 2.00 pm 30th September 2010 for mitigation.



John Connors
**JOHN CONNORS
COMMISSIONER**

30 SEPTEMBER 2010