

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

**NO. 001/2011
NO. 002/2011**

BETWEEN: CHIEF REGISTRAR

Applicant

**A N D: MUHAMMAD SHAMSUD-DEAN SAHU KHAN
SAHU KHAN & SAHU KHAN**

**1st Respondent
2nd Respondent**

**Applicant : Ms V. Lidise, Mr A. Chand & Ms M. Rakai
1st Respondent : Ms N Khan
2nd Respondent : No Appearance**

**Date of Hearing : 13th July 2011
Date of Ruling : 13th July 2011**

**EXTEMPORE RULING
ON NOTICES OF MOTION**

1. There are before the Commission two notices of motion. One with respect to Matter No 001 of 2011 and another with respect to Matter No 002 of 2011.
2. At the commencement of the hearing of the motions Ms Khan indicated that she appeared on behalf of both, the 1st Respondent and 2nd Respondent.
3. Following submissions made on behalf of the Applicant, that a receiver had been appointed to the 2nd Respondent, Ms Khan acknowledged that her instructions were from the 1st Respondent on behalf of the 2nd Respondent and not from the receiver.
4. It is my opinion that a receiver having been appointed to the 2nd Respondent that the receiver is the only person able to give instructions on behalf of the 2nd Respondent and accordingly there is no appearance on behalf of the 2nd Respondent with respect to either motion.

5. The motions with respect to the 2nd Respondent will therefore be dismissed.
6. The notices of motion raise four issues for determination they are the jurisdiction of the Commission to hear the applications as the 1st Respondent is no longer a legal practitioner.
7. Secondly that I should recuse myself from both matters for different reasons.
8. Thirdly that the matter the subject of application 001 of 2011 is sub-judice in that there are proceedings current in the High Court of Fiji, Labasa Registry.
9. Fourthly that with respect to Matter No 002 of 2011 there has been a finding of fact resulting in a prohibition on further proceeding by the virtue of principles of res judicata.

JURISDICTION

10. The 1st Respondent's submission with respect to jurisdiction is dependant upon the definition of legal practitioner in section 2 of the Legal Practitioners Decree 2009.
11. That section defines "practitioner" or "legal practitioner" as meaning a person admitted to practice as a legal practitioner under the provisions of this Decree and includes a person who before the commencement of this Decree was admitted as a legal practitioner in the Fiji Islands.
12. It is submitted on behalf of the 1st Respondent that following upon the earlier determination of this commission when his name was removed from the role of legal practitioners that he is no longer a person admitted to practice as a legal practitioner and therefore not caught by the definition.
13. It is further submitted that section 121 of the Decree, by its wording is dependent upon the respondent being a legal practitioner.
14. It is acknowledged on behalf of the 1st Respondent that the proceedings relate to allegations at a time when the first respondent was on any interpretation a legal practitioner and held a practicing certificate. It is also acknowledged on behalf of the 1st Respondent that at the time the proceedings were commenced, that is matters 001 of 2011 and 002 of 2011, the 1st Respondent was a legal practitioner holding a current practicing certificate.
15. Apart from those acknowledgments it is then submitted that the relevant time to consider the status of the first respondent is now, that is, at the time of the hearing of the application and that the 1st Respondent is no longer a legal practitioner therefore the

Commission is precluded from hearing the applications currently filed and would be precluded at the completion of the hearing from disciplining the 1st Respondent pursuant to section 121.

16. This last submission of course is predicated upon the basis that at the end of the hearing there would be a finding that the allegations in the complaint are found proved and that therefore section 121 is triggered.
17. In looking to interpret legislation one of the principles applicable is to look to give legislation a purpose. If one were to take the interpretation of "legal practitioner" as is submitted on behalf of the Respondent then the disciplinary provisions of the decree would have no operation in many circumstances. As is detailed earlier the definition uses the words "a person admitted to practice as a legal practitioner" it does not say "currently admitted to practice", it does not say "holding a current practicing certificate" but refers to a person admitted to practice either pursuant to the decree or a person admitted to practice under the prior legislation.
18. To give the decree operation and meaning it must require a broad interpretation of the words "admitted to practice as a legal practitioner" not the narrow interpretation that the Respondent seeks. Support for the broad interpretation comes from section 99(5) which provides that a complaint to the Registrar may be made against legal practitioners who have ceased to practice or law firms who have ceased to operate. I am therefore of the opinion that the definition must be read in its broadest sense and must be read to mean a person who has been admitted to practice as a legal practitioner and that of course includes the 1st Respondent and I accordingly find that that the Commission has jurisdiction to hear and determine the applications now before it.

RECUSAL

19. It was submitted with respect with both matters that I should recuse myself from hearing the matters. With respect to matter number 001 of 2011 this is done on a basis that is not clearly expressed. It appears to be that I have heard and determined a prior matter. With respect to matter number 2 the basis is clearly set forth and is that I have made a finding of fact on a relevant matter in earlier proceedings.
20. Matter 2 of 2011 relates to an allegation that the 1st Respondent has made a false declaration. In the judgment delivered by the Commission in matter 002 of 2010 on the 3rd March 2011 at paragraphs 25 to 32 various pieces of evidence are set forth. There are no findings of fact made in those paragraphs. Findings of fact are made with respect to the 1st Respondent at paragraphs 138 to 151 of the judgment.
21. Several prior rulings have been delivered by the Commission dealing with the issue of bias and recusal. Relevant matters for consideration were set out in *Chief Registrar v Haroon Ali Shah matter 001 of 2010 (15th September 2010)* and in matter *Chief Registrar v Iqbal Khan & Associates matter 009 of 2009 and 010 of 2009 (21st of June 2010)*. In addition I have been referred by the applicant to further recent authorities in the High

Court of Fiji which do not change the principles expressed and the rulings to which I have referred. The principles in this country are still those set forth by the Supreme Court of Fiji in *Amlna Koya and The State CAV 3002 of 1997*, that is the test to be applied is an objective one and the person making the objective assessment is taken to be a fair minded informed and reasonable person. In applying the test the courts both here, in Australia, in England and elsewhere have repeatedly said that it is a jurisdiction that must be exercised with caution to avoid there being any element of "judge shopping" but also to avoid there being any perception of bias on the required subjective assessment.

22. With respect to matter 2 of 2011 I am of the opinion that there is indeed no prior finding of fact relevant to the issues for determination now before the Commission and with respect to both matters I am of the opinion that a proper application of the principles expressed in the authorities it is not appropriate for me to recuse myself in these matters.

SUB - JUDICE

23. With respect to matter 001 of 2011 it is submitted that there are currently proceedings before the High Court Labasa Registry involving a complainant and the 1st Respondent that deal with issues the subject of the application.
24. Proceedings before disciplinary tribunals such as this Commission are proceedings designed to protect the public and are very separate and distinct proceedings from proceedings that might be taken by a member of the community against a legal practitioner for the recovery of moneys or proceedings that might be taken by the State against the legal practitioner for a crime.
25. Principles of sub-judice are fundamentally intended to protect the integrity of proceedings before courts so that facts that are in issue are not disseminated prior to the courts judgment. The principle stops the publication of those facts but the principle in my opinion has no application in the present circumstances.

RES JUDICATA

26. The issue of res judicata has previously been dealt with by the Commission in *Chief Registrar v Abhay Singh matter 001 of 2009 (25th January 2010)*. The authorities there set forth clearly highlight the distinction that must be drawn between disciplinary proceedings before the tribunal such as this and other proceedings in the court system. In any event as its detailed earlier there has in my opinion been no finding in those earlier proceedings that would be impacted by any finding that could be made in the current proceedings. There is therefore no merit in the submission that the principle of res judicata should preclude matter 002 of 2011 proceeding.

CONCLUSION

27. For the reasons stated I am of the opinion that the notices of motion cannot succeed and must therefore be dismissed.

ORDERS

1. Both notices of motion are dismissed with respect to the 1st Respondent and the 2nd Respondent.
2. The matter is to proceed to a hearing as previously set down at 9.30am tomorrow the 14th of July.


JOHN CONNORS
COMMISSIONER



13 JULY 2011