

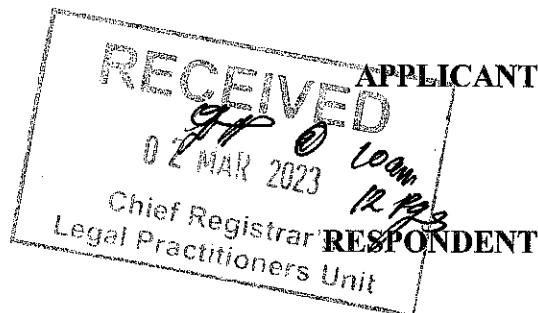
IN THE INDEPENDENT LEGAL SERVICES COMMISSION

AT SUVA

ILSC CASE NO. 018 of 2021

BETWEEN: CHIEF REGISTRAR

AND: KEVUELI TUNIDAU



Counsel: Ms. J. Sharma for the Applicant

No Appearance

Date of Hearing (Pleading) : 28 September 2022

Written submissions : 20 October 2022

Date of Judgment : 27 February 2023

DETERMINATION

Introduction

1. There were three separate applications against the Respondent Kevueli Tunidau namely, application number ILSC 015 of 2021 (LPU Ref. No. 091/21), application number ILSC 016 of 2021 (LPU Ref. No. 102/21) and application number ILSC 018 of 2021 (LPU Ref. No. 70/12). By order dated 7th April 2022 the Chief Registrar was permitted to consolidate the two matters pending under Applications Nos. 015 of 2021 and 016 of 2021 with this application bearing number ILSC 018 of 2021. The Allegations (Charges) were so consolidated on 27th May 2022 containing three allegations of Professional Misconduct against the Respondent Kevueli Tunidau as follows:

COUNT 1

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

PARTICULARS

KEVUELI TUNIDAU, legal practitioner, being the principal practitioner of **KEVUELI TUNIDAU LAWYERS**, failed to respond to matters contained in a complaint lodged by one **SEKOVE TAWAKEOU** dated 2ND July 2021, as required by the Chief Registrar by a notice dated 29th September 2021 pursuant to section 104 & 105 of the Legal Practitioners Act 2009 and thereafter failed to respond to a subsequent reminder notice dated 11th October 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.

COUNT 2

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

PARTICULARS

KEVUELI TUNIDAU, legal practitioner, being the principal practitioner of **KEVUELI TUNIDAU LAWYERS**, failed to respond to a complaint lodged by one **WATI TELU** dated 16th June 2021, as required by the Chief Registrar by a Notices dated 29th September 2021, pursuant to section 104 & 105 of the Legal Practitioners Act 2009 and thereafter failed to respond to a subsequent reminder Notice dated 11th October 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.

COUNT 3

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

PARTICULARS

KEVUELI TUNIDAU, a legal practitioner, being the principal practitioner of **KEVUELI TUNIDAU LAWYERS**, failed to respond to a complaint lodged by a **EMMANUEL MANI** dated 11th April, 2012, as required by the Chief Registrar by Notice dated 29th September 2021, pursuant to sections 104 & 105 of the Legal

Practitioners Act 2009 and thereafter failed to respond to a subsequent reminder Notice dated 11th October, 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 was 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, section 104 of the Legal Practitioners Act 2009 (henceforth will be also referred to as the LPA) require the Chief 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:

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."

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 a Practitioner to respond to the section 105 or 106 notice, 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]*

4. If there is no response to the initial notice under s.106, the Registrar is then empowered 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 fails to respond within 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. The present allegations of Professional Misconduct is based on Sections 82(1)(a) and 83(1)(g) of the LPA which is 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;'*

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 Act:

...

*(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 am to sum up the Legal basis of 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 allegations of professional misconduct pursuant to sections 82(1)(a), 83(1)(g) read with section 108(2) of the LPA, of the failure to respond by the legal practitioner to the notice issued by Chief Registrar pursuant to s.108(1) of the LPA and provide a sufficient and satisfactory explanation in writing or produce such documents which is **deemed** to be professional misconduct by virtue of section 108(2).

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

8. 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).

9. 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.

10. 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 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 a way of swift transfer (Exhibit PE2). Thereafter, when the Respondent was contacted 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 contacted 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.

11. 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 refuse to pay the money. Accordingly, Mr. Kalim had lodged this complaint with LPU on the 19th August, 2019 (Exhibit PE3).

12. 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 collaborates much of the above facts.
13. Witness no. 3 Mr. Ponipate Turuva states that he resides of 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.

Summary of Evidence

14. The Chief Registrar in proof of these charges led the evidence of Tulia Adidreu. She is attached to the LPU as an Assistant Court Officer. She had received three complaints from Sekove Tawakevou, Wati Telu and Emmanuel Mani dated 02nd July, 2021, 16th June, 2021 and 11th April, 2012 respectively. These three complaints have been registered according to the documents under LPU reference numbers 0091/21, 102/21, and 70/12 respectively. The evidence in respect of these three complaints and the steps taken according to her evidence is as follows. All these complaints have been against the Respondent Kevueli Tunidau.

Complaint by Sekove Tawakevou (Count No. 1)

15. This complaint has been received on the 02nd July, 2021 (Exhibit A1). The Chief Registrar has by letter dated 9th July, 2021 written to the Respondent and informed of this complaint (Exhibit A2). However as there was no response to this letter a copy of the complaint has been sent to the Respondent by email on the 9th July, 2021 (Exhibit A4). This was followed by a Notice under section 104 dated 26th August, 2021 and also a Notice under section 105 (Exhibit A5—both letters together) which had been emailed on the 26th August, 2021 (Exhibit A6).
16. The attempts to serve these Notices through the officers of the Lautoka High Court have not been successful as Mr. Tunidau could not be found. Affidavits of service were produced as Exhibit A7. This was followed by a fresh Notice under section 104

as well as Section 105 (Exhibit A8-both letters together). The said Notices dated 29th September, 2021 have been dispatched by post on the 29th September, 2021. The confirmation of postage receipt was produced as Exhibit A9. As there was no response section 108 Notice dated 11th October, 2021 (Exhibit A10) was dispatched by post on the 12th October, 2021. The confirmation of postage receipt was produced as Exhibit A11. There had been no response to this final Notice either.

Complaint by Wati Telu (Count No. 2)

17. The complaint of Wati Telu was received by the Chief Registrar's office on 09th June, 2021 (Exhibit A12). The complaint was against Mr. Tunidau alleging the failure to return the sum of \$81,000 was not deposited as instructed from the Trust Account (Exhibit A12). Upon the receipt of this complaint the Chief Registrar by letter dated 13th August, 2021 informed the Respondent of this complaint (Exhibit A13). This has also been had conveyed by email (Exhibit A14). As there was no response the Chief Registrar sent a Notice under section 104 dated 29th September, 2021 and also sent a Notice under section 105 dated 29th September, 2021 to the Respondent in respect of this complaint. These two letters were dispatched by post on the 29th September, 2021. The confirmation of postage receipt was produced as Exhibit A16. There had been no response to this final Notice either.

18. As such Notice under section 108 dated 11th October, 2021 reminding the failure to respond to both the aforesaid Notices and requiring for information was sent by post. This was dispatched by post on the 12th October, 2021. The confirmation of postage receipt was produced as Exhibit A18. There had been no response to this final Notice either. According to Ms. Adidreu this has also been forwarded by email. The attempts to deliver this by Sherriff of the Lautoka High Court has not been successful.

Complaint by Emmanuel Mani (Chief Registrar's Reference No. 070/12 (Count No. 3)

19. The complaint of Emmanuel Mani was received by the Chief Registrar's office on 11th April, 2021 (Exhibit A19). The complaint was against Mr. Tunidau alleging delay, overcharging, incompetence and misrepresentation (Exhibit A19). Upon the receipt of this complaint the Chief Registrar has by letter dated 14th May, 2012 informed the Respondent of this complaint (Exhibit A20). Mr. Tunidau did respond

to this letter by his letter dated 04th July, 2012, by which he submitted some clarification in respect of the complaint made by Emmanuel Mani (Exhibit A21).

20. Thereafter, the Chief Registrar by his Notice under section 105 (2) dated 20th July, 2021 sought an explanation (Exhibit A22). This had been forwarded by email dated 20th July, 2021 (Exhibit A22-2nd page). The attempt to serve through the Sherriff of the Lautoka High Court has not been successful (Exhibit A22). As there was no response the Chief Registrar has once again sent a fresh Notice under section 105 (2) dated 29th September, 2021 (Exhibit A25). This Notice was dispatched by post on the 29th September, 2021. The confirmation of postage receipt was produced as Exhibit A26. There had been no response to this Notice either.
21. As such Notice under section 108 dated 11th October, 2021 reminding the failure to respond to the aforesaid Notice was sent by post (Exhibit A27). This was dispatched by post on the 12th October, 2021. The confirmation of postage receipt was produced as Exhibit A28. There had been no response to this final Notice either. According to Ms. Adidreu this has also been forwarded by email. The attempts to deliver this by the Sherriff of the Lautoka High Court has not been successful.
22. The details of the email address and the other addresses of the Respondent was obtained from the last practicing certificate application submitted by the Respondent practitioner on the 27th February, 2020 (Exhibit A3). According to which his postal address is Kevueli Tunidau Lawyers, PO Box 2364, Lautoka and his email address is ktunidau@yahoo.com.au.

Evaluation

23. According to the evidence the Notices under section 104 & 105 and 105 (2) dated 29th September, 2021 in respect of all three allegations have been dispatched on the same day. These Notices have been dispatched on the 11th October, 2021. Similarly Notices under section 108 (1) in respect of all three allegations also have been dispatched on the same day. In all 6 Notices have been so dispatched. The witness testified that these were sent in the form of emails and also there were sent by post

and in proof of which confirmation of postage receipts were produced as exhibits A9, A11, A16, A18, A26 and A28. These 6 receipts contain the LPU reference numbers, the particulars of documents, the number of pages and the details of the addressee, the reference numbers correspond with the present allegations. The addressee is the Respondent practitioner. On all of these receipts the date stamp of the "POST FIJI PTE LTD-GOVERNMENT BUILDING" along with the respective dates of accepting the said Notices for postage are clearly visible. These receipts for all purposes are clear acknowledgments of accepting the said items notices. The receipt is titled "Confirmation of Postage" is that such items have been accepted for delivery. This is clear evidence that the said documents and Notices stated in the receipts have been accepted for delivery upon the postage being paid. Therefore, it is clear evidence that the said Notices were posted on a pre-paid basis. In view of the provision of section 145 of LPA this is within the meaning of posting such notice or document by pre-paid post to that person. Apart from the document witness Ms. Adidreu confirmed the dispatch in that manner. The Notices so sent have not returned. This for all purposes is sufficient prove and evidence of delivery and service of the said Notices to the Respondent practitioner

24. Independent to the said service by post the said witness also stated that all these Notices were simultaneously forwarded by email. There had not been any return either. Is this due service in accordance with the provisions of Section 145 of the LPA? Section 145 reads follows;

"145. Any notice or other document whatsoever required under this Act to be given or served on a practitioner or former practitioner may, unless otherwise provided, be given or served by delivering such notice or document personally to that person, or posting such notice or document by pre-paid post to that person at his or her usual or last known place of business or abode or the place of business or abode last notified by that person to the Society."

25. Section 145 of the LPA, expressly provides for in two methods of *service* of notices. It is either *by delivering such notice personally to that person, or posting such notice by pre-paid post to that person.* Whilst section 145 expressly provides for two specific methods of service of notices it does not exclude other forms of delivery if *it*

is otherwise provided for. Section 5 of the Electronic Transactions Act is such an instance. Section 5A of the Electronic Transactions Act provides that;

“ 5A.—(1) Where any written law, for the time being in force in Fiji, requires information or documents to be presented, stored, retained or generated in its original paper based form, such requirement is deemed to be satisfied by information contained in a data message, electronic document, electronic record or other communication in electronic form, if there exists a reliable assurance with regard to assessing the integrity of the said information from the time such information was first generated in its final form as a data message, electronic document, electronic record or any communication or otherwise, and the said information contained in the data message, electronic document, electronic record or communication is available and can be used for subsequent reference.”

26. Thus, section 145 of the Legal Practitioners Act read with Section 5 of the Electronic Transactions Act enables serving of any notice lawfully under the LPA via electronic means in the electronic form by email.
27. In the above circumstance it is well and sufficiently proved on the required civil standard that the Respondent practitioner was served with the notices requiring him to furnish explanations. The evidence is that on all three occasions the Respondent has failed and neglected to respond within the stipulated 14 days. It is further in evidence that the Respondent had in-fact not made any meaningful attempt to provide the said information even up to the date of hearing.
28. When these applications were instituted a copy of the application had been served on him on the 10th November, 2021. Then as the matter progressed, the closing submissions of the Applicant was also served on him on 21st October, 2022. The affidavits of service confirms this. This is evidence of subsequent conduct of the Respondent demonstrating his total disregard and his lackadaisical attitude in responding to notices.
29. On the evaluation of the evidence in its totality, the fact of duly serving of notices and the failure to respond within the stipulated time are proved. That being so the

deeming provision of section 108(2) of the LPA comes into operation and it is deemed that the respondents did in fact commit Professional misconduct as alleged. The respondent has failed to *furnish any explanation for his failure* either.

30. There is no doubt that the failure to respond on all the occasions is proved. There have been six notices. The only irresistible inference is that the respondent did deliberately disregard the notices and remained without responding to the said Notices. Even if he was negligent he is culpable. Any oversight or negligence is no excuse and such lapse will *per se* be attributed to the Practitioner and it was the Practitioner's duty and obligation to follow up and ensure that a response was duly sent to the LPU.
31. By virtue of the presumption in section 108 (2) the failure within the stipulated time to respond is deemed to be professional misconduct and it shall be presumed that the Respondent practitioners has committed professional misconduct. In the above circumstances I am satisfied that all three allegations of professional misconduct made in counts 1, 2 and 3 have been proved on the required high civil standard. Thus, the Commission after reviewing the evidence presented by counsel for the Chief Registrar finds that the said allegations of failure to respond in counts 1, 2 and 3 are established.
32. 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