

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2021/HP/1137

IN THE MATTER OF: THE LEGAL PRACTITIONERS
ACT CHAPTER 30 OF THE LAWS
OF ZAMBIA

AND

IN THE MATTER OF: SECTION 22 (3) (B)

AND

IN THE MATTER OF: A REPORT OF THE DISCIPLINARY
COMMITTEE

AND

IN THE MATTER OF: A COMPLAINT AGAINST A LEGAL
PRACTITIONER

BETWEEN

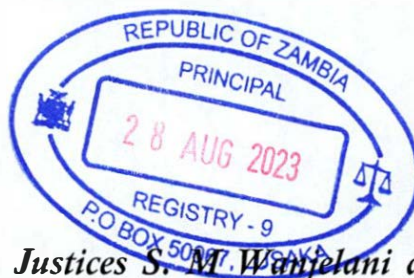
THE LAW ASSOCIATION OF ZAMBIA

APPLICANT

AND

DERICK BWALYA

RESPONDENT



*Before the Honourable Lady Justices S. M. Wangelani and C. Lombe Phiri in
Chambers on 28th August, 2023.*

*For the Applicant: Mr. S.N. Lungu of Messrs Shamwana and Company.
For the Respondent: Mr. M. Nsapato of Messrs Nsapato and Company.*

JUDGMENT

Phiri, C.L, J, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Krige and Another v Christian Council of Zambia (1975) Z.R 152 (S.C)**
2. **Lumus Agricultural Services Company Limited & Others v Gwembe Valley Development Company Limited (In receivership) (1999) ZR 1.**
3. **Saluwema v The People 1965 ZR 4 (CA)**
4. **The Legal Practice Council v Daniel Gerrit Smit Van Wyk 3920/2013**
5. **Council of the Law Society of the ACT v Bandarage [2019] ACTSCFC 1**
6. **George Malachi Mabuye v Council of the Legal Education (1985) Z.R 10**

LEGISLATION REFERRED TO:

1. **Evidence Act Chapter 43 of the Laws of Zambia**
2. **Legal Practitioners Act Chapter 30 of the Laws of Zambia**
3. **Authentication of Documents Act Chapter 75 of the Laws of Zambia**
4. **Law Association of Zambia Act Chapter 31 of the Laws of Zambia**
5. **Penal Code Act Chapter 87 of the Laws of Zambia**

OTHER MATERIAL REFERRED TO:

1. **Cross, Rupert & Tapper, Colin, Cross on Evidence 6th Edition, Butterworths, London, 1985.**

1.0 INTRODUCTION

- 1.1 The Applicant, the Law Association of Zambia(LAZ) filed this Notice of Motion seeking that the Respondent, Mr. Derrick Bwalya, be struck off the Roll of Practitioners. The Notice of Motion was

launched pursuant to the provisions of Section 22(3) of the Legal Practitioners Act.

2.0 BACKGROUND

2.1 The Respondent herein is a Legal Practitioner and a Member of LAZ who has been practicing under the name and style of Lloyd Jones and Collins. The Record shows that the allegations against the Respondent relate to the mismanagement or misappropriation of client funds.

2.2 The Complaint was initially heard by the LPC which suspended the Respondent from Practice. The matter was then referred to the Disciplinary Committee (DC) on 16th April 2018. The DC heard the parties and delivered a ruling on 26th April 2019 which found that the Respondent had acted dishonestly and without integrity in handling its client's affairs and recommended, that the Respondent be struck off the Roll of Practitioners.

2.3. Consequently, this Notice of Motion was filed into Court pursuant to **Order 30 Rule 15 of the High Court Act**, on 22nd September 2021, seeking an Order to strike off the Respondent's name from the Roll of Practitioners in Zambia.

3.0 SUMMARY OF EVIDENCE

3.1 On behalf of the Applicant, Mr. Eddie Kwesa, a Secretariat staff of the DC, deposed to an Affidavit dated 22nd September

2021, wherein he averred that Mr. Maysoun Ibrahim, lodged a written complaint against the Respondent before the LPC.

- 3.2** It was further averred that after hearing the complaint, the LPC suspended the Respondent and on 16th April 2018 referred his case to the DC. That the DC rendered a Ruling on 26th April 2019, that the Practitioner had acted dishonestly and without integrity. It was also averred that the DC recommended that the Respondent's name be struck off the Roll of Practitioners. The Report of the Proceedings, evidence and relevant documents were produced in the supporting affidavit and marked "EK1 – 57".
- 3.3** In response to the Application, the Respondent filed an Affidavit in Opposition dated 7th July 2022, wherein he averred that prior to his suspension and while practicing law under the name and style of Messrs. Lloyd Jones and Collins ("the Firm"), he received instructions on and around October 2015, from Longulf Trading (U.K.) Limited ("the Client") to act against Melcome Industries Limited, which culminated in a Judgment in favour of the client for the payment of \$355,000.00.
- 3.4** It was averred that Melcome Industries Limited commenced payment of the Judgment debt on 21st March 2016, paying at irregular intervals and amounts. It was further averred that in addition to the irregularities Melcome Industries Limited's Advocates would at times inform the Respondent that payment was being made, but at other times would not, leading to a

challenge as various payments into the Firm's Client Account had insufficient narrations.

- 3.5** It was stated that, as a result, money transferred from Melcome Industries Limited into the Firm's Client Account co-mingled with other money and was indistinguishable. It was averred that following queries from the Client, the Respondent conducted investigations and discovered, to his surprise, that Melcome Industries Limited had completed payment as of 18th August 2016.
- 3.6** The Respondent averred that following his discovery, he communicated to the Client and undertook to remit the funds by the end of April 2017, as per the emails marked "DB2". It was stated that for some unforeseen reasons, the Respondent was unable to remit the funds in time, prompting the Client to issue a letter of complaint to the LPC.
- 3.7** It was averred that as a Firm a reconciliation was conducted and all the money was forwarded to the Client by October 2018. It was contended that despite the harmonious end between the Client and the Respondent, the DC elected to agree with the recommendation of the LPC, to strike the Respondent's name off the Roll of Practitioners in Zambia.
- 3.8** The Respondent stated that he verily believed the advice of his Advocates that the DC made its decision in the absence of any evidence, as prescribed by statute. It was stated that if there was evidence, then the DC acted without proper examination of the evidence, relying on "*prima facie*" and "manifest" ideals.

- 3.9** It was further vied that the DC ought to have heard the matter '*de novo*' and carried out its own investigations into the matters raised before it, to enable it to arrive at its own independent decision, as opposed to hardly analyzing the matter and simply agreeing with the LPC.
- 3.10** The Respondent further averred that the DC proceeded to hear and determine the Application in the absence of the Client who was the original and substantive Applicant. It was stated that the DC proceeded to hear the Application against the Respondent without any allegations in an affidavit under the hand of the Client as the Affidavit before the LPC was one sworn by Silas Mambwe in his capacity as Secretary (Midlands) of the LPC.
- 3.11** He further stated that the Affidavit sworn by Silas Mambwe had exhibited the letter of complaint from the Client, merely sent from the United Kingdom and that the Client was not available to confirm or testify to the assertions in the letter nor available to be cross-examined. It was averred that the said Silas Mambwe also appeared in the Proceedings before the DC as Prosecutor alongside James Gideon Kalokoni.
- 3.12** It was also stated that the LPC admitted the letter of Complaint as evidence even though the said letter was written as a means to register a grievance and not as evidence of the allegations made. And further that the said letter of complaint was not even authenticated by a Notary Public in the United Kingdom but was nevertheless admitted as evidence by the LPC.

- 3.13 The Respondent stated that the DC proceeded to hear the Application, in the absence of the Client and did not provide proof of service of the Notice of Hearing on the Client as required and that thus in the absence of the Client, LAZ assumed the role of the Client albeit without providing proof of its appointment to act.
- 3.14 The Respondent averred that despite his response to the Application, no professional accountant or indeed any accountant was summoned during the hearing to interrogate the Firm's books and accounts to confirm or dispel the Respondent's assertions or indeed give an independent report on the matter as required by law, more so because the Application was based on allegations under **Part VIII of the Legal Practitioners Act Cap 30** and the DC's Ruling was to the effect that the Respondent had breached the said Part of the Act.
- 3.15 It was contended that the decision of the DC had caused the Respondent large amounts of undue hardship because he gained no benefit from the delay in remitting the Client's funds and that he had added interest to the debt for the delay. It was averred that as a Practitioner, the Respondent exhibited utmost professionalism throughout his years of practice and should not be made to suffer owing to the insufficient narration of money sent into their accounts.

- 3.16 The Respondent averred that he verily believed that the allegations against him were never proven let alone properly adjudicated in accordance with the law.

4.0 SKELETON ARGUMENTS

- 4.1 The Respondent also filed Arguments in Opposition to the Originating Notice of Motion on 7th July 2022. The gist of the arguments was that there were several defects in both the Ruling and Proceedings of the LPC and the DC and as a consequence, no reliance could be placed on the Report, as the same fell below the requisite standard for the Court to take the recommended action by the DC.
- 4.2 Counsel for the Respondent, put across five distinct heads of arguments and in particular contended that there was no cause shown or case disclosed against the Respondent to warrant striking his name off the Roll of legal practitioners.
- 4.3 It was submitted that the complaint that formed the basis of the Proceedings against the Respondent originated by a Complainant outside the jurisdiction who never appeared for the Proceedings before the LPC nor the DC, and therefore the reception and reliance of the evidence was a nullity as same amounted to hearsay.
- 4.4 The Court was referred to **Section 3 of the Evidence Act**, on the admissibility of documentary evidence. It was submitted that the Report would show that the Complainant never appeared and no

explanation was given as to the reason for his absence, let alone shown if any attempt was made by the Complainant to attend nor shown that it was not reasonably practicable to secure the attendance of the Complainant.

- 4.5 The Court was referred to **Rule 30 of the Legal Practitioners (Disciplinary Proceedings) Rules**: which provides that:

“The Evidence Act shall apply in relation to proceedings before the Committee in the same manner as it applies in relation to civil and criminal proceedings.”

- 4.6 The Court was further referred to the decision of **Krige and Another v Christian Council of Zambia** ⁽¹⁾ wherein the Supreme Court opined that:

“You cannot waive the provisions of statute”

- 4.7 It was submitted that the provisions of a statute could not be waived and the DC was mandated to demand compliance, let alone seek an explanation as to why the Complainant did not appear before it. It was further submitted that in the absence of both, the evidence presented was hearsay and had no evidential value to discharge the burden requisite to finding a Legal Practitioner wanting.

- 4.8 Solace was found in the learned authors of **Cross on Evidence** ⁽¹⁾ at page 38, wherein they stated as follows:

“an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.”

4.9 It was further argued that in proceedings relating to fiscal dishonesty of a practitioner, the DC was compelled by statute to summon an accountant to examine the financial records. In this instance, no such professional was summoned therefore the findings were a nullity. It was further argued that in casu, no accountant was engaged to examine the Respondent's accounts, and no attempt was made to engage a professional accountant. The Court was referred to **Section 68 (3-6) of the Legal Practitioners Act**. It was emphasised that **Section 68(3) of the Legal Practitioners Act** was couched in mandatory terms.

4.10 It was stated that the allegations that led to the Report of the DC, now being considered was that the Respondent breached **Section 60(b) of the Legal Practitioners Act**, and therefore it was recommended that the Respondent be struck off the Roll of Legal Practitioners. It was submitted that the procedure laid out in the Act was not complied with as it related to **Part III of the Legal Practitioners Act**.

4.11 The Respondent's Counsel submitted that the Complainant sent the complaint by a letter from the United Kingdom, which letter was

admitted as evidence against the Respondent, before the LPC and the DC. It was argued that that the acceptance of the letter of complaint authored outside our jurisdiction and not collated in an affidavit duly notarised by a notary public rendered the complaint and evidence nullity for violating the **Authentication of Documents Act**. That the letter violated **Section 3 of the Authentication of Documents Act** and should never have been admitted into evidence as per the case of **Lumus Agricultural Services Company Limited & Others v Gwembe Valley Development Company Limited (In receivership)** ⁽²⁾.

- 4.12 It was submitted that according to statute, those proceedings were deemed to be judicial in line with the **Penal Code Act**, thus subjecting them to the laws of natural justice and a criminal evidential burden, of which the standard of proof was never discharged by the Complainant.
- 4.13 It was stated that the recommendation sought by the Applicant was life crippling and offended the fundamental right to practice one's profession and therefore it was fundamental that the allegations be clearly made and succinctly proved to a standard higher than the ordinary. The Court was referred to **Section 23 (3) of the Legal Practitioners Act** which provides as follows: -

"The hearing of an application under section twenty-two shall, for the purposes of Chapter XI of the Penal Code, be deemed to be a judicial proceeding."

- 4.14 It was submitted that the standard of proof in proceedings to find a Practitioner liable was akin to those required to prove offences in the penal code, rendering proceedings to the criminal standard of proof as stated in the case of **Saluwema v The People** ⁽³⁾, being beyond a reasonable doubt. It was stated that the DC made no effort to discharge the standard of proof and decided the case solely on what was termed prima facie. That there was no evidence, let alone findings that the Respondent was not fit to practice.
- 4.15 It was submitted that the disciplinary action taken against a practitioner revolved around the seminal question of whether or not such a practitioner was a fit and proper person to practice law, in light of the need to protect the public from unfit practitioners.
- 4.16 It was further posited that in assessing whether or not a practitioner had fallen short of this standard, the Court could be aided by the South African case of **The Legal Practice Council v Daniel Gerrit Smit Van Wyk** ⁽⁴⁾, wherein Sher J opined as follows:

“it is well-established that in applications of this nature a three-stage process is envisaged. In the first place the Court is required to determine whether the conduct complained of has been established [...] If this is the case the Court must then determine, in the exercise of its discretion, whether the person concerned is not a fit and proper person to continue to practise. This involves a value judgment which is arrived at after weighing the offending conduct against the conduct expected of an attorney. Thereafter, the Court must similarly determine in the exercise

of its discretion whether, in the light of the circumstances before it, the practitioner must be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. Whether a Court will impose the one or the other sanction depends on a consideration of all the circumstances before it including 1) the nature and seriousness of the misconduct in its totality and the extent to which it reflects adversely upon the practitioner's character or shows him to be unworthy to remain in the ranks of what is considered to be an honourable profession 2) the probability of such conduct being repeated and 3) the need to protect the public. Ultimately it is said the question is one of 'degree'. In deciding which course to follow the primary consideration is the protection of the public, and the imposition of a sanction on the practitioner is secondary thereto. Therefore, if a Court finds that, based on the facts before it the practitioner is not a fit and proper person to continue to practise it does not necessarily follow that he/she must be removed from the roll as a matter of course. The personal and professional implications of striking a practitioner from the roll are serious and a Court making such an order envisages that he/she should not be permitted to practise again. If the Court has sufficient and good reason to believe that a suspension will suffice and that after a period of time, the practitioner will be able to rehabilitate himself, it may impose such a sanction instead of an order removing him from the roll."

4.17 It was submitted that, unlike the Van Wyk ⁽⁴⁾ case where the Practitioner was afforded multiple times to reform but did not, this

case was different in that in that the allegation herein was never proved, let alone given a proper hearing.

4.18 It was further stated that the Respondent's Affidavit showed that he had already endured significant hardship in these Proceedings and would not pose any danger to the public or the reputation of the legal profession and the veracity of the allegations against him remained in doubt. The Court was referred to the case of **Council of the Law Society of the ACT v Bandarage** ⁽⁵⁾ with respect to the severity of striking off from the Roll.

4.19 Lastly, the Court was referred to **Section 28 of the Legal Practitioner Act** which states as follows:

"(1) The Court, after considering the evidence taken by the Disciplinary

Committee and the report and having heard counsel, if any, for such committee and the practitioner to whom the application relates or his counsel, and after taking any further evidence, if it thinks fit to do so, may admonish the practitioner to whom the application relates or may make any such order as to removing or striking his name from the Roll, as to suspending him from practice, as to payment by him of a fine not exceeding ten thousand penalty units, as to the payment of costs, and as to restitution or otherwise in relation to the case, as it may think fit, or may exonerate the practitioner."

4.20 It was submitted that should the Court not entirely exonerate the Respondent, this was a classic case in which the Court should consider alternative penalties such as a fine against that the Respondent, more so that the proceedings and evidence in the Report violated the very core of the most mandatory statutory provisions.

5.0 HEARING

- 5.1 When the matter came up for hearing on 11th January 2023, learned Counsel for the Applicant Mr. S.M. Lungu S.C. informed the Court that he would rely on the Affidavit sworn by Eddie Kwesa that had been filed in support of the motion. He then went on to buttress the Application and submitted that lawyers are the gatekeepers of the law and entrusted by clients to be of high integrity in the conduct of their trade.
- 5.2 State Counsel posed the question, on whether *the Respondent in the exercise of his duties as a practitioner exhibited high levels of integrity or not?* It was submitted that the facts of the case revealed that the Respondent failed in his duties as an Advocate to exhibit high levels of integrity. Reliance was placed on the case of **George Malachi Mabuye v Council of the Legal Education** ⁽⁶⁾, which discussed the test to be applied and found that the criteria for fitness was integrity.
- 5.3 It was submitted that the Respondent in his own words at the LPC stated that he inadvertently misappropriated the client's fund which was co-mingled with money in the account. It was stated that the only response to what happened to the money throughout the

proceedings by the Respondent was that it was co-mingled in an account.

- 5.4 In response to the Respondent's challenge regarding the complaint having been authored outside of the jurisdiction, its authentication and also the challenge of the lack of the accountant's certificate, Mr Lungu SC stated that the Respondent forgot that he acknowledged the letter of complaint before the LPC in response to the complaint. He further stated that the Respondent committed before the LPC that he would make good and repay the money owed by him.
- 5.5 It was submitted that it was unfortunate that the Respondent decided to now challenge the complaint raised against him for having infringed the Rules of authentication.
- 5.6 Counsel for the Applicant said that before the LPC, the Respondent stated that he was remorseful and that he had taken personal introspection and acknowledged that such a thing would never happen again. The Court was referred to email correspondence marked "EK11-15", wherein the Respondent acknowledged the complaint and agreed that he misappropriated the funds. It was stated that the admission of misappropriating the client's funds was misconduct.
- 5.7 Regarding the Accountant's Report, it was submitted that the Application was made pursuant to **Section 22 of the Legal Practitioners Act** as the issue was simply the failure to account to the Client and not the management of the Practitioners Bank Accounts

which application would have been made under **Section 58/60 of the Legal Practitioners Act** and should not be an issue of consideration before the Court.

- 5.8 It was submitted that the Mabuye ⁽⁶⁾ case, provided a good test and that in the said case the Court stated that certain aspects of misconduct could not be a blemish for the rest of one's professional life, therefore the stiffest punishment of being struck off would be unfair, however, certain types of misconduct could not be tolerated in the profession.
- 5.9 State Counsel stated that the Court was bound by the Mabuye ⁽⁶⁾ case, but this case was distinguishable because lawyers were entrusted by the public to exhibit the highest levels of integrity in all dealings, of which misappropriation of client's funds went to the root of what is not required of as lawyers.
- 5.10 In summation, State Counsel asked the Court to consider if the Respondent could be entrusted with any other client's funds, and if the Respondent had shown any aspects of remorse from the activities that led him to be suspended. It was stated that it was becoming a habit of practitioners to fail to account for client funds and prayed that the Notice of Motion succeeds.
- 5.11 In response, learned counsel for the Respondent Mr. Nsapato stated that the real question was what allegation was levelled against the Respondent, and was the said allegation established to the requisite standard to warrant the Court striking the Respondent off the Roll.

It was submitted that there was no establishment of the allegations. It was submitted that DC found that the Respondent had breached **Section 60(b) of the Legal Practitioners Act**, which section fell under **Part III of the Legal Practitioners Act** and therefore an accountant's report needed to be presented.

- 5.12 It was submitted that the Respondent told both the LPC and the DC that the funds were co-mingled with other clients' funds and there was no evidence of the Respondent using the funds in his personal capacity. It was stated that the Affidavit in Opposition showed clearly that attempts were made by the Respondent to reconcile the funds relating to the complainant.
- 5.13 It was further stated that the Record would show that some of the payments made in instalments had no narration, and therefore time was needed to reconcile with the Bank. It was stated that had the LPC complied with mandatory requirements under **Section 8 of the Legal Practitioner Act** it would have found that what was needed was a reconciliation.
- 5.14 Regarding proof of the allegation, Counsel submitted that the proceedings of LPC and the DC seemed to suggest that the burden of proof was on the Respondent, contrary to the law. The Court was referred to **Rule 30 of the Legal Practitioner Disciplinary Rules** on the application of the **Evidence Act** in proceedings before the committee, as it applied to criminal and civil proceedings.

- 5.15 It was stated that the **Evidence Act** was clear concerning both standard of proof and how evidence was to be produced before a tribunal or Court. It was stated that the record revealed that the only allegation against the practitioner was the letter authored outside our jurisdiction and delivered to LPC and therefore the complaint was not established because the proceedings offended the **Evidence Act** as the same was hearsay and in further offended the **Authentication of Documents Act** as the letter of complaint was not in an affidavit and notarised.
- 5.16 Counsel refuted any admission, and stated that upon reconciliation all the funds were duly remitted to the client.
- 5.17 It was submitted that the Court had four options as to the penalties it could impose if an allegation was found, but stated that this was not a proper case for the Respondent to be struck off the Roll, unlike the Supreme Court decision of **George Mabwe v Council of Legal Practitioners** where there was a clear misappropriation of client funds, this case made it unsafe to have a clear misappropriation of client funds, owing to the lack of an accountant's report, breach of the **Evidence Act** and **Authentication of Documents Act**.
- 5.18 It was submitted that the Respondent should be exonerated.
- 5.19 In reply it was submitted there was no strict requirement for any Accountant's certificate as the same was not mandatory. It was further submitted that the complaint was lodged on 22nd May 2017 and the Respondent responded to the complaint on 21st September

2017 and acknowledged it. It was stated that after the response the LPC sat, therefore, all aspects of the **Evidence Act** were complied with.

- 5.20 It was submitted that the Court had power as enunciated in the **Mabuye** ⁽⁶⁾ case to look into the facts of a case and make a determination. It was stated that the Court would come to no other conclusion than the Respondent misconducted himself and acknowledged that he inadvertently misapplied the funds.

6.0 ANALYSIS AND DETERMINATION

- 6.1 We have considered the Notice of Motion, the Affidavit in Support, the Affidavit in Opposition and the Skeleton arguments in Opposition as well as the oral submissions by respective Counsel.
- 6.2 It is not in dispute in this matter that the Respondent is an advocate of the High Court for Zambia, that at the material time he plied his trade in the firm of Lloyd, Jones and Collins. It is also not in dispute that the complaint against the Respondent related to the mismanagement of client funds. Also that in his explanation to the LPC and the DC the Respondent explained that the Complainant's funds had been co-mingled with funds belonging to other clients hence the failure by him to properly or timeously account for the same. It is further not in dispute that the

Respondent had occasion to be heard both before the LPC and the DC before the matter was brought before the Court.

6.3 The issue that remains for determination is whether the form and substance of the Motion before us is one that can warrant striking the Respondent off the Roll of Practitioners.

6.4 The practice of law is a privilege granted by the State therefore Legal Practitioners are bound by a strict code of ethics and professional responsibility. They are in addition bound to uphold the rule of law, promote justice and should not engage in unbecoming conduct. To sum it as alluded to by the Applicant's Counsel, Legal Practitioners are the gatekeepers of the law and entrusted by public to be of high integrity in the conduct of their trade. The allegations against the Respondent are of a serious nature, constituting a breach of his fiduciary duty to his client and a failure to uphold the principles of honesty, integrity, and competence that are expected of members of the legal profession.

6.5 We note that in responding to the Notice of Motion, the Respondent has sought to raise, what we shall term as technicalities in the manner that the Complaint was filed and the admissibility of certain evidence that was presented at the hearings before the LPC and the DC. This is on the backdrop of his earlier representations of apologies and admissions made of misapplication of the Client funds after advancing a reason of co-mingling of funds in the Firm's Client

Account and lack of narration on some of the transactions remitted to that Account by the Client's Debtor.

6.6 The question is, if there had been compliance with the procedures as alleged by the Respondent, would the substantive narrative of the complaint and response have changed? We think not.

6.7 The Report rendered to this Court shows that the facts and evidence presented before the LPC and the DC has always been the same. Notably, when responding his response to the Complaint to the Legal Practitioners 'Committee vide a letter dated 21st September, 2017, the Respondent stated "*As the Complainant will not be in attendance at the hearing, but will rely on the documents lodged, I will also rely on the Response herein*". The Ruling of the DC delivered on 26th April, 2019, shows that the Respondent was represented by Counsel who supplemented the Affidavit evidence with oral submissions. In addition, in responding to the Complaint in exhibit "EK-29", the Respondent stated inter alia that:

6.8 "*May it please the Committee, below is my response to the Complaint against me...The facts alleged in the Complaint dated 22nd May, 2017 are a fair portrayal of the chronology of events leading to the raising of the Complaint against me. I do however unequivocally deny any misappropriation of funds or at all as alleged by the Complainant...I would like to state that the contrary to the allegation by the Complainant, the failure to remit the total funds collected on their behalf in a timely fashion was not intentional nor was it deliberate or aimed to unjustly deprive the Complainant of its funds, the remission which is admitted was*

the result of inadequate accounting which resulted in an inadvertent comingling of funds. The delay and resultant inconvenience caused to the Complainant in so doing are regretted and it is in this vein that I undertook to reimburse the Complainant the full sums outstanding to them together with interest.... again I reiterate that the delay in remitting the outstanding funds to the Complaint was not deliberate nor was it meant to undermine them. The actions complained of and the inconvenience occasioned to the Complainant are deeply and truly regretted."

Thus we are of the considered view that the issues raised by the Respondent, even if they were to be legitimate would not have an impact on the outcome of the Proceedings but would merely work to delay the inevitable. We take this position guided by the principles alluded to in some employment cases that "where it is not in dispute that the employee has committed an offence for which appropriate punishment is dismissal and he is also dismissed, no injustice arises from failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that a dismissal is a nullity. (see the cases of **National Breweries Limited v Philip Mwenya SCZ Judgment No. 28 of 2002** and **Justin Mwengwe v Examination Council of Zambia, Appeal No. 212 of 2015**)

We therefore find that the issues raised by the Respondent, can be said at the very least, to be attempts to save oneself from drowning by clutching at straws. As is rightly submitted by the Applicant the issues raised have not only come late in the day but are a total misapprehension of the cited provisions.

6.9 The issue is that the Respondent received funds on behalf of the Complainant which funds were deposited into the Firm's Clients Account. The Respondent alleged that this led to co-mingling of funds. Further, that according to his email to the Complainant, due to lack of narration on some of the remittances, their bankers mistakenly attributed the payments to other parties from whom they were expecting and receiving payments for onward transmission and in some instances appropriation to their own funds.

6.10 We note that section 60- of the Legal Practitioners Act provides:

60. No money shall be drawn from a client account other than-

(a) money properly required for payment to or on behalf of a client or for or towards payment of a debt due to the practitioner from a client or money drawn on the client's authority, or money in respect of which there is a liability of the client to the practitioner provided that the money so drawn shall not in any case exceed the total of the money so held for the time being for such client;

(b) such money belonging to the practitioner as may have been paid into the account under paragraph (b) or (d) of section fifty-nine;

(c) money which may by mistake or accident have been paid into such account in contravention of section fifty-nine.

6.11 In addition, Section 52 of the same Act alludes to professional misconduct as including breaching the provisions of Part VIII under which section 60 above falls. The Respondent admits that the funds were inadvertently misapplied and that the Firm would pursue its bankers and other parties concerned. Notably, in his response to the Complaint, the Respondent appears to have taken personal

responsibility to repay as he states in part. *“on account of unforeseen difficulties in raising the sum due to the Complainant, I was unable to reimburse the complainant by end of April, 2017, as I had undertaken to do. However, I still remain very much committed to repay the Complainant what is due to it from me...”*

This to us shows that the Respondent did misappropriate the Complainant's funds contrary to his assertion that it was co-mingled and he was pursuing the other parties involved. The lack of sincerity exhibited by the Respondent at this stage only goes to demonstrate his dishonesty, lack of integrity and further his lack of remorse for his actions. He is clearly not a proper person to practice the legal profession.

7.0 CONCLUSION

7.1 Upon careful consideration of the evidence and arguments presented and our analysis herein, we find that the Respondent has engaged in professional misconduct. The conduct displayed by the Respondent not only undermines the trust and confidence that the public places in the legal profession but also reflects a disregard for the principles that govern the practice of law.

7.2 In light of the severity of the misconduct and to uphold the integrity of the legal profession, it is hereby ordered that Mr. Derrick Bwalya be struck off the Roll of Legal Practitioners. The decision to strike off the Roll is not taken lightly, but it is necessary

to protect the public and maintain the high standards of the legal profession

7.3 The Parties shall bear their own costs.

7.4 Leave to appeal is granted.

DELIVERED IN CHAMBERS THIS 28TH DAY OF AUGUST 2023

.....
S. M. WANJELANI
HIGH COURT JUDGE

.....
C. LOMBE PHIRI
HIGH COURT JUDGE

