MBAALALA B. MUNUNGU AND THE LEGAL PRACTITIONERS ACT, CAP. 48 (1990 - 1992) Z.R. 159 (S.C.)

SUPREME COURT
NGULUBE, AG. C.J.
8TH AND 26TH OCTOBER, 1992
(S.C.Z. JUDGMENT NO. 6 OF 1992)

Flynote

Legal practitioners - Restoration to roll - Chief Justice's basis for exercise.

Headnote

The petitioner sought to have his name restored to the Roll, by way of the discretionary powers enjoyed by the Chief Justice to order the Registrar to replace on the Roll the name of a practitioner who had been struck off. He was struck off in 1977 following conviction of theft by servant, but had since rehabilitated and was employed as a legal assistant with the permission of the disciplinary committee of the Law Association of Zambia.

Held:
The Chief Justice's discretion to restore to the Roll should be exercised on the basis of special and compelling factors or grounds founded on principle. In

this regard the public interest or the interests of the profession must override those of the individual seeking restoration.

Cases referred to:
(1) Re: a Solicitor (No. 5 of 1990).
(2) Re :M. (No. 5 of 1987).
(3) Re Nicholas Lambert Jones (Decision 4946) Law Society's Gazette No. 2 of 15th January, 1992.
(4) Mabuye v Council of Legal Education (1985) Z.R. 10.
(5) In Re Hill [1867-68] S.L.R. Q.B. 543.
(6) In re Weare [1893] 2 Q.B. 439.

Legislation referred to:
1. Legal Practitioners Act, cap. 48, s.33.

For the disciplinary committee: C. K. Banda, Solicitor-General and M.Lwatula and C. Mwansa.
For the Law Association of Zambia: L. Nyembele.
For the applicant: In person.
N. Kawanambulu, *amicus curiae.*

Judgment

NGULUBE, AG. C.J.:

This is an application brought by way of petition by Mr Munungu to have his name restored on the Roll of Practitioners. The applicant was called to the Bar of this country on 7th June, 1971 and held a practising certificate every year until 1977. At the time he was employed as a corporation lawyer by the Rural Development Corporation. The salient facts of the misconduct which led to his name being struck off the Roll sufficiently appear in the case concerning him reported in the 1983 Zambia Law Reports at page 48 wherein his name was ordered to be struck off. Very briefly, the appellant pleaded guilty to five out of six counts of theft by public servant committed on different dates between 28th October, 1976 and 3rd March, 1977 and he was sentenced to a term of imprisonment, part of which was suspended. The disciplinary committee considered an application from the Law Association of Zambia and after hearing the matter found that the applicant's dishonest behaviour in stealing the money, the subject of the criminal conviction, was conduct unbefitting a member of the legal profession and likely to bring the profession into ridicule and contempt. They recommended that he be disbarred and the Court duly ordered that his name be struck off the Roll of Practitioners.

The applicant has been languishing for close to 15 years since the misconduct or 10 years since his name was struck off. However, with the permission of the disciplinary committee under the terms of s. 49 of the Legal Practitioners Act, he has been employed firstly by Messrs Shamwana and Company under Mr Kawanambulu and currently by Messrs M.A. Patel and Company under Dr Shimaponda. He is desirous of regaining his status as a legal practitioner and to be entitled to practise law in his own right once again. He has invoked the jurisdiction vested in me by s. 33 of the Legal Practitioners Act which reads:

> ''The Chief Justice may, if he thinks fit, either on his own initiative or on the

> recommendation of the disciplinary committee, at any time order the Registrar to replace on the Roll the name of a practitioner whose name has been removed from or struck off the Roll.''

I am alive to the fact that, in my capacity as guardian of the legal profession and custodian of the Roll, the discretion and the power vested in me by the section quoted must be exercised only for very good reasons and on sound principles. Since the review of the applicant's position was not at my initiative and there was equally no originating recommendation from the disciplinary committee, I considered it right and proper that both that committee and the Law Association should indicate their attitudes towards the petition. I am indebted to both bodies and to their representatives who appeared before me. The disciplinary committee conducted a hearing and they have lodged a record of the proceedings before them together with the comments and some authorities. They have made available to me the evidence and submissions tendered by the witnesses and that of the applicant who fully appreciated the seriousness of his misconduct but who has - I am prepared to find - truly repented. There was evidence also that the Law Association had no objection to the application as such. Testimonials were produced from Mr Kawanambulu and Dr Shimaponda as to the applicant's rehabilitation and good behaviour since the striking off and while working under their strict supervision in the firms previously mentioned. The disciplinary committee itself objects and has vigorously opposed this application, both in their record of proceedings and in oral submissions before me. The applicant's case consisted of showing contrition and praying for forgiveness and another chance, citing his own good conduct in the intervening period and the suffering he and his

family have gone through on a legal assistant's salary. He has argued that being struck off the Roll did not constitute a permanent disability and has cited some English authorities where convicted solicitors have been restored after paying back the money taken and after showing subsequent good behaviour. He also relied on the fact that other practitioners have since accepted his presence in their midst and that the Law Association raises no objection. I am indebted to the applicant for the authorities cited, the thinking in some of which will be reflected in this judgment. I am equally indebted to him for his submissions in which he commented on the report of the disciplinary committee and argued that he has since redeemed himself.

The disciplinary committee base their objection to this application on several grounds. They argued that the interests of the profession and of the general public have to be considered before those of the applicant. In their submission, the question is not whether the applicant has repented but what damage would be done to the profession and the profession's reputation if those convicted of crimes involving dishonesty can bounce back, especially at a time when the profession is having to deal with an increasing number of complaints involving dishonest lawyers. They pointed out that the offences committed by the applicant involved a course of conduct over a period of time and were not a consequence of a single momentary lapse explainable or excusable on some ground which would justify a belief that there was here misconduct hardly likely to be repeated. It was the disciplinary committee's submission that there was now an indelible

stain on the character of the applicant and the profession could do very well without him. I am grateful to the disciplinary committee for drawing my attention to a number of authorities. One of them is *InRe a solicitor* [1] heard before Lord Donaldson, M.R., from which the following passage taken from *Re M.* [2] was quoted by Mr *Banda*, the Solicitor-General. quote:

> ''The Problem is, quite simply, one which I have met before and on which I have expressed a view before, namely, that, however sympathetic one may be towards an individual member of either branch of the legal profession, if you fall very seriously below the standards of that profession and are expelled from it there is a public interest and an interest in the profession itself in hardening its heart if any question arises of your rejoining it. Neither branch of the profession is short of people who have never fallen from grace. There is considerable public interest in the public as a whole being able to deal with members of those professions knowing that, save in the most exceptional circumstances, they can be sure that none of them has ever been guilty of any dishonesty at all.''

I have no doubt that the good name of the profession must be of paramount importance. However, s. 33 of the Legal Practitioners Act does contemplate that there may be cases where restoration would be justifiable. In dealing with a similar provision, Lord Donaldson said in *In Re a solicitor* [1] quoting from page 5 of the typed transcript before me and I quote:

> ''I approach the matter, as I hope I have always approached previous cases, on the footing that there is a parliamentary intention that in some circumstances it must be possible for somebody to have been involved in a situation which justified their being struck off the Roll for having brought the profession into disrepute and been unfit to be solicitors, but in which,

> nevertheless, thereafter, by their own efforts or otherwise, a different situation would arise in which it is right that they should be permitted to be restored to the Roll. That is clearly the parliamentary intention.''

I also respectfully agree with Lord Donaldson in the same case when he observed to the effect that the category of cases where a disbarred lawyer can be restored must be very narrow indeed. The question before me is whether the applicant can be regarded as fitting into such rare category. The section itself, of course, leaves the matter open and does not assist, one way or the other, to indicate in which special circumstances this very special provision can be involved. Obviously it would be idle to attempt to speculate and I must confine myself to seeing whether there are grounds in this case for entertaining this application or if, in fact, on principle and on the merits that is not the position.

The disciplinary committee made much of the fact that the dishonesty here was systematic and a course of conduct which, they submitted, was a stain on the applicant's character and, in the words of the tribunal in the case of *Re Nicholas Lambert Jones* I [3] at page 38, rendered him unacceptable as a member of the profession. I also recall what the Supreme Court had to say in the case of a student lawyer in *Mabuye v Council of Legal Education* [4] where on the facts and merits of the case, the previous unfitness of the student was held not to have attached a permanent stigma and where evidence of subsequent good character and conduct was found to have

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redeemed the student. The Supreme Court recognised that the majority of the cases of disqualification concerned dishonesty or other serious disgraceful misconduct. I would like to quote a fairly substantial passage from *Mabuye* starting from page 14 where the Supreme Court had this to say:

> ''The overriding criterion for fitness to practise is integrity and for a disqualification to be maintainable, it should be made to appear quite clearly that the misconduct complained of not only seriously undermined such integrity but also that no amount of contrition and subsequent good conduct can be regarded as having repaired and redeemed the applicant's integrity.''

In this regard, the nature and quality of the misconduct and any evidence of subsequent good conduct become relevant. In *In Re Hill* [5], an application was made to strike an attorney off the Roll, on account of his having stolen some money. The misconduct was undoubtedly a serious one but because, for a period of three years after the theft, Hill had conducted himself well and done nothing wrong, he was not struck off. Instead, he was suspended for a year because their Lordships in that case (Cockburn, C.J., Blackburn, J., Mellor and Lush, J.) all felt that the subsequent good conduct was factor in his favour. Again in *In Re Weare* [6] the question arose as to the striking off of a solicitor who had been convicted of a criminal offence of letting his houses to be used as brothels. In the course of his judgment Lord Esher, M.R., observed, at page 446:

> '' The Court is not bound to strike him off the Rolls unless it considers that the criminal offence of which he had been convicted is of such personally disgraceful character that he ought not to remain a member of that strictly honourable profession.''

In the same case, Lopes, L.J. observed, from the bottom of page 499 to the next page:

> '' I wish to make only one observation with regard to a point that arose about the conviction. It is perfectly clear that the mere fact that a person has been convicted of a criminal offence does not make it imperative on the Court to strike him off the Roll. There are serious criminal offences and lesser criminal offences. For instance, one can imagine a solicitor guilty of an assault of such a disgraceful character that it would be incumbent on the Court to strike him off the roll. On the other hand, one can imagine an assault of a comparatively trifling description, where in all probability the Court would not think it its duty to interfere.''

The Court was there dealing with a student who had previously been a lay magistrate in which capacity he had been dismissed for misusing his powers by unjustifiably issuing bench warrants in situations unrelated to his proper functions as a magistrate. The principles quoted, however, apply here with the additional observation in this case, which concerns restoration, that the interests of the profession and of the public must be taken into account so that the personal rehabilitation of the applicant, I though relevant, cannot be, in my view, an overriding consideration. I can also not lose sight of the fact that, although at first the Law Association appeared to give unqualified support to the applicant, Mr *Nyembele* did indicate preference for a proposition suggested by myself that if the

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applicant were to be restored there might be conditions attached as to where and how he might practise. I am equally mindful of Mr *Kawanambulu*'*s* candid submission which qualified the apparent support initially indicated in favour of the applicant and when he also expressed concern at the prevalence of complaints concerning dishonesty. Integrity and fitness to practise relates to these attributes from the point of view and in the eyes of the public and the profession. An objective view is called for and the question of personal repentance can hardly be the most important criterion.

The difficulty in this case is to determine whether, in the current circumstances and on principle, the personal rehabilitation of the applicant can outweigh the interests of the public and those of the profession which has an ample supply of lawyers who have not fallen from grace. In this regard, I am mindful that this case will have a considerable amount of presidential value and the wrong impression ought not to be created that favourable treatment is or will be available even in very serious cases involving dishonesty such as the case here. As the disciplinary committee submitted, the offences here were without extenuation and systematic. There is undoubtedly a stigma attaching to persons who have been convicted of thefts in these circumstances.

In regard to the applicant's moving plea for forgiveness and the alleviation of his family's suffering, I note that he is in fact gainfully employed albeit under close supervision and on a reduced remuneration package. The support given by the Law Association and Mr Kawanambulu was cautious and guarded. In short, there was still that lingering doubt and this was not good for the applicant's case. In an effort to seek a compromise, it was mooted at my suggestion whether I might not consider restoration on strict conditions, such as requiring that the applicant should thereafter

only be able to practise in public institutions where no practising certificate is needed or where he would not be called upon to take charge of client's funds. In the event, there was no basis for introducing such a consideration into this application when there was no evidence that any such public institution had made an offer of employment. The only offer of employment indicated in the proceedings was from his current employer who has permission from the disciplinary committee on fairly strict conditions.

This has been a difficult case but I have not found any special or compelling factors or indeed any grounds found on principle and the public interest or the interest of the profession to invoke the rare jurisdiction conferred by s.33 of the Legal Practitioners Act. The application is refused. However, I make no order as to costs, since the case raised a matter of general interest to the profession.

Application refused.