IN THE MATTER OF BERNARD MBAALALA MUNUNGU, A PRACTITIONER

AND

IN THE MATTER OF THE LEGAL PRACTITIONER`S ACT (1983) Z.R. 48 (H.C.)

HIGH COURT
SAKALA, J. AND MUMBA, J.
27TH JANUARY ,1983.
(1982/HP/1380)

Flynote

Legal Practitioner's - Criminal offence - Conviction and sentence- Striking off roll - Reason for.
Legal Practitioner's - Misconduct - Theft by servant - Effect under Legal Practitioner's Act - Fitness to continue in practice.
Legal Practitioner's - Misconduct - Criminal conduct covered

Headnote

The practitioner in question was convicted of several counts of theft by servant, in the subordinate court of the first class and sentenced to one years imprisonment with hard labour, six months of which was suspended. The Disciplinary Committee established under s.4 of the Legal Practitioner's Act No. 22 of 1973, applied by way of recommendation to the High Court, that the practitioner's name be struck oft the roll of practitioners, on the basis that it was serious case of misconduct unbefitting member of the legal profession.

Held:

(i) The practitioner's name may be struck off the roll, not by way of second punishment but because he is not a proper person to practice the legal profession.

(ii) Although the Legal Practitioner's Act does not specifically say so, theft by servant amounts to grave misconduct rendering the practitioner in question unfit to continue in practice; the proviso to s.53 being wide enough to cover theft as misconduct

(iii) Criminal conduct which may render a legal practitioner unfit relates to a criminal conviction whether connected with his conduct or not or whether involving money matters or not; this rule being flexible under special circumstances, for instance a conviction for mere conspiracy, due to carelessness, and where previous to the conviction the practitioner was merely suspended, the test being whether it was a personally disgraceful offence or not.

Cases cited:

(1) Re Weare (1893) 2 Q.B. 432

Legislation referred to:

Legal Practitioner's Act, Cap. 48, ss. 52, 53, 22.

For the practitioner: F. Chuunga, Silweya and Co.
For the Disciplinary Committee: C. C. Manyema, Solicitor - General and N. Mavrokefalos, D.H. Kemp and Co.

Judgment

SAKALA, J. AND MUMBA, J.,

This is an application by way of a recommendation to the court by the Disciplinary Committee (hereinafter called the Committee) established under section four of the legal Practitioners Act No. 22 of 1973. The Disciplinary Committee found at a serious case of misconduct had been made out on the part of the practitioner unbefitting a member of the legal profession. The Committee recommended that the name of the practitioner be struck off the roll of practitioners.

FACTS NOT IN DISPUTE

The practitioner was employed as a corporation lawyer by the Rural Development Corporation holding a practising certificate No. 2093. On 14th July 1977, the practitioner appeared before the subordinate court of the first class for the Lusaka District charged with six counts of theft by public servant contrary to sections 272 and 277 of the Penal Code, cap. 146 as amended by Act No. 29 of 1974. The six offences were committed on different dates, between 28th October, 1976 and 3rd March, 1977. The total amount stolen was K2,183.00. The practitioner, who was represented, pleaded not guilty to all the six counts.

On 15th November, 1977, the trial commenced. After the prosecution called three witnesses the case was adjourned to 29th November, 1977, for continued hearing. Before the trial commenced on 9th February, 1978, there had been several adjournments at the instance of the defence. The resumed trial started with the cross-examination of PW3 at the end of which the defence applied for an adjournment. From the 9th of February, 1978, the case was adjourned on eleven occasions again at the instance of the defence. On 13th July, 1978, when the trial resumed, the defence counsel informed the court that his instructions were to change the plea. Fresh pleas were taken on five counts and the accused pleaded guilty to all the five counts. The court entered pleas of guilty on all the counts and convicted the practitioner on all counts after admitting the facts as per evidence as correct.

THE SENTENCE

Before the practitioner was sentenced his advocate made a very passionate and lengthy plea in mitigation. The court, before sentencing the accused observed:

"The accused is a first offender who is entitled to leniency. He has pleaded guilty to five counts of theft by public servant. After pleading guilty the accused has since repaid the monies back to his employers. I take into account what the learned counsel for

the defence has ably said in mitigation. Mr Gani has asked for suspended sentence for reasons that he set out in his plea in mitigation one of these reasons was that the accused was guilty only by reasons of technicality due to the wide definition of theft as regards monies. It has been contended that the accused had an intention to repay the money and indeed he has repaid the money. Unfortunately the facts do not seem to agree with this submission. The accused first stole in October, 1976, in March,1977 and then finally in July, 1977. There was no attempt on the part of the accused to repay any money. He repaid after the matter was before court. The accused is a Lawyer by profession and I have no doubt he is aware of the criminal law of this country. As Mr Gani in my view rightly put it the accused behaved in rash and foolish manner.

The Corporation's client was harassed from non-payment of her instalments when she had

in fact paid, this was a very bad thing. I would have been inclined to impose a suspended sentence had the accused been charged with only one count. But in this case, there are five counts against the accused and it appears to me that he had reached stage when he was taking money just as he wanted. I do not consider that a suspended sentence would be appropriate. But in view of the fact that the accused now stands ruined man through his own folly because with these convictions he may find it difficult to practice his profession and the fact that he has now repaid all the proposed money, I propose to be lenient."

Thereafter the court sentenced the practitioner to one year imprisonment with hard labour on each count to run concurrently making the total sentence to be served to be one year with six months of it suspended.

THE DISCIPLINARY PROCEEDINGS BEFORE THE COMMITTEE

On 23rd June, 1981, the Honorary Secretary of the Legal practitioners Committee of the Law Association of Zambia applied to the Disciplinary Committee to have, *inter alia*, the name of the practitioner struck out of the roll of practitioners. The application was supported by an affidavit. The affidavit states that the practitioner was practising in Lusaka with the Rural Development Corporation Ltd., holding practising certificate No. 2093 and whilst acting in his professional capacity committed an act of dishonesty namely, theft by public servant for which he was prosecuted and convicted and sentenced to imprisonment. The affidavit exhibited some correspondence indicating the various attempts made by the Legal Practitioners Committee to obtain the case records but without success. Paragraphs 4, 5, 6 and 7 of the affidavit in opposition read:

"(4) That as to paragraph 3, I have this to say: I was indeed prosecuted for theft of money by public servant, but the circumstances of such charge were that:

(a) the money had been entrusted to me for payment to the cashier.

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(b) in the normal course of duty, I handed this money to my secretary for payment to the cashier.

(c) this was the normal procedure in my office,

(d) unfortunately that time the secretary failed to follow this procedure.

(e) as a result the money was not accounted for.

(f) as head of department I was made answerable for the default.

(g) and in the ordinary circumstances I accepted responsibility and therefore was prosecuted and convicted.

(h) I accepted paying back the money involved and I did pay back.

(5) That in the light of this the subordinate court felt obliged to pass only a minimum sentence on me of six months simple imprisonment.

(6) That my prosecution and eventual conviction was strictly, on my negligence in failing to effectively supervise my subordinates.

(7) That I did not myself make personal use of the money."

On 12th July, 1982, the Disciplinary Committee heard the application.Subsequently the Committee made a report which is on record. Paragraphs 16, 17 and 18 of the report read:

"16 On these facts, we are unable to agree with the Practitioner's contention that he was only found guilty by reason of his responsibility as a supervisor, in that he failed to ensure that his subordinate officers paid over the money to the appropriate department.

17. We have considered the provisions of s. 52 of Cap. 48 which define certain offences by Practitioners and have come to the conclusion that the misconduct investigated herein does not form part of such offences. Nevertheless, we are satisfied that the Committee is empowered to inquire into such forms of misconduct by virtue of proviso (ii) to s. 53 of Cap. 48 which is as follows:

> (ii) nothing in s. 52 shall restrict the powers of the Disciplinary Committee under s. 22 to inquire into or deal with misconduct by Practitioners of whatsoever nature or kind, whether mentioned in s. 52 or otherwise.

18. We regard Mr Munungu's behaviour as unbefitting a member of the Legal Profession and as likely to bring the Profession into ridicule or contempt."

After making reference to Cordery's Law Relating to Solicitors, fourth edn. in paras 19 and 20 of the Report, the Committee said in paras 21 and 22 of the Report.

"21. We are, therefore, satisfied that a case of misconduct has been made out on the part of the practitioner and we are of the opinion that the present case is a serious instance of conduct unbefitting member of the legal profession.

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22. We do not consider that such misconduct may adequately be dealt with by the Committee. Therefore, we recommend to the Court that the name of the Practitioner be removed from the Roll."

THE HEARING OF THE REPORT BY THE HIGH COURT

On the 17th of November, 1982, submissions were made before us in relation to the Report presented by the Committee. On behalf of the Committee, the learned Solicitor - General pointed out that the Committee submitted the Report to court in accordance with the provisions of s.22 of the Legal Practitioners Act because the Committee was of the onion that the application brought against the practitioner was of such a serious nature that the Committee was unable to dispose of the matter under the powers vested in it.

On behalf of the practitioner, Mr Chuunga, submitted that in its report the Committee did not consider other circumstances pertaining to the case for instance, change of plea from not guilty to one of guilty.

Suffice is to mention that Mr Chuunga tendered before us lengthy and detailed submission which he said was made by his client intended for the Committee but mistakenly passed on by him to Mr Ndhlovu. Suffice is also to mention that we have read and considered the written submissions

tendered before us. On account of the view we take of this matter, we find it unnecessary to outline the written submissions in our judgment. It is, however, on record.

THE LAW

The research we have been able to conduct reveals that this appears to be the first application of this kind to come up before the High Court. Section 52 of the Legal Practitioners Act sets out the various offences that may be committed by a practitioner in the course of his practice. All these offences are deemed professional misconduct (*see* s. 53). Theft by a practitioner is not included in s. 52. But on our part, we are satisfied that the proviso to s. 53 of the Legal Practitioner's Act is wide enough to cover theft as a misconduct. In our view, to accept a suggestion that theft by a practitioner was not intended to be an offence to be dealt with under the Legal Practitioners Act would lead to very ridiculous happenings. For instance, practitioner may commit any offence under the Penal Code and because he has already been convicted and punished for those offences he may still be on the Roll and continue to practice simply because the Penal Code does not provide for the punishment of striking off the Roll and simply because the Legal Practitioners Act does not provide for any offence under the Penal Code. If this was the position then the Legal Profession would not be worth the honour it has earned over the centuries.

The author of *Cordery on Solicitors*, 5th edition page 462 under the heading non-statutory grounds for disciplinary action by the court or Disciplinary Committee, sets out three kinds of misconduct which

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makes a solicitor unfit to continue in practice as: Criminal conduct, professional misconduct and unprofessional conduct and on the same page under the heading criminal conduct the author states:

"Conviction for a criminal offence, whether connected with his character as a solicitor or not, and whether involving money matters or not, prima facie makes solicitor unfit to continue on the roll. His name is struck off, not by way of a second punishment, but because he is not a proper person to be a solicitor.

This, however, is not an inflexible rule, and the Court has, under special circumstances, refused to act upon a conviction for mere conspiracy, and might equally refuse where the conviction is due to carelessness, and has refused to strike a solicitor's name off the roll where previously to his conviction he had for the same offence been merely suspended."

In *Re Weare* (1) Lord Esher at page 446 put the test as follows:

"Is it a personally disgraceful offence or is it not? . . . Ought any respectable solicitor to be called upon to enter into that intimate intercourse with (the offender) which is necessary between two solicitors even though they are acting for opposite parties."

While mindful that the circumstances of each case will be carefully considered by the court, we are entirely in agreement on the principles of law set out above.

CONCLUSION

We have in the present application considered the history and the circumstances leading to the practitioner committing the offences resulting the present proceedings. In the first place, we regret

that case which ended by a plea of guilty before the subordinate court should have taken almost one year to dispose of. We note, however, that; the delay was caused by the defence. But in the present proceedings we are not retrying the practitioner. Our task is to determine on the undisputed facts of the case that was before the subordinate comb whether the conviction of the practitioner on five counts of theft by public servant does not make him unfit to continue on the Roll? In other words, is he a proper person to continue in practice?

We have very carefully and seriously considered the record of the case, the application and the affidavits in support and opposition as well as the Report by the Disciplinary Committee. We are satisfied that the practitioner's conduct is so serious that it renders him unfit to remain a member of the honourable legal profession. We have further considered the mitigation on his behalf. But although this is the first case of this nature we consider that for the sake of the profession a deterrent punishment in the circumstances of this case is called for. We, therefore, order that the name of Bernard Mbaalala Munungu, a practitioner, be off struck the Roll of Practitioners.

Order accordingly

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