

THE LAW SOCIETY OF ZIMBABWE
versus
ROSEWITTER MADEMBO
and
AUXILIA MANGWAIRA

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSAKWA JJ
MR D. KANOKANGA AND MRS S. MOYO
HARARE, 30 September, 28 October 2016 and 7 July 2017

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

Ms *Chagadama*, for the applicant
T. *Mpofu*, for 1st respondent
2nd respondent in person

MUSAKWA J: In the two separate applications the applicant seeks orders that the respondents' names be deleted from the register of legal practitioners plus expenses incurred in instituting the proceedings. The respondents are registered legal practitioners. It is averred by the applicant that the respondents have conducted themselves in an unprofessional manner. This is because prior to the respondents' admission as legal practitioners they were convicted of a criminal offence. The respondents did not disclose the convictions to the applicant upon applying to be registered as legal practitioners.

Despite the two separate applications it was expedient that a composite judgment be prepared. This is because the respondents were jointly charged in the criminal matter and the issues for determination are the same.

From the papers filed with the Tribunal, it is noted that on 26 March 2012 the respondents were convicted of contravening s 170 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were jointly charged. Each of them was sentenced to 24 months' imprisonment of which 6 months were suspended for five years on condition of good behaviour. A joint appeal against conviction and sentence was noted with the High Court on 27 March 2012. The appeal is yet to be finalised.

On 22 February 2016 the applicant wrote to the respondents advising that *prima facie*, their convictions amounted to unprofessional conduct. The applicant also sought to know from the respondents the circumstances under which they were convicted and whether they appealed, and if so, the status of the appeal.

In her reply dated 11 March 2016 the first respondent confirmed that she was convicted when she was working as a public prosecutor. She also stated that she had noted an appeal and was committed to prosecuting it. However, the appeal had been postponed *sine die* on account of no legal representation for the second respondent. On another occasion the appeal had been struck off the roll as the respondents had not been served with notices of set-down.

The second respondent replied through her legal practitioners on 3 March 2016. It was indicated that a meaningful response was to be made as soon as possible. On 12 April 2016 the second respondent personally wrote to the applicant. She confirmed being convicted in 2012 when she was a prosecutor at the Magistrates Court. She further stated that she had noted an appeal and she entertained high prospects of success. She also stated that the appeal had been postponed *sine die* and that on another occasion it had been struck off the roll as they had not been served with notices of set down.

At the commencement of the present proceedings Mr *Mpofu* raised some points *in limine*. He submitted that since these are civil proceedings, s 31 of the Civil Evidence Act [Chapter 8:01] prohibits the adduction of evidence of a criminal conviction until the criminal appeal has been abandoned or disposed of. Since the applicant is a creature of statute, it cannot exercise powers that are not provided in its enabling Act. Thus the present proceedings should be stayed until the criminal appeal is disposed of.

The second issue raised by Mr *Mpofu* was that there is an order of the High Court directing how the criminal appeal should be set down. It was his contention that the applicant has not complied with the order. Despite heads of argument having been filed, the appeal has not been set down.

The second respondent adopted the same preliminary points advanced on behalf of the first respondent. She also submitted that she will be bound by the Tribunal's decision in respect of the first respondent.

Ms *Chagadama* submitted that s 31 of the Civil Evidence Act should be read together with s 28 of the Legal Practitioners Act [*Chapter 27:07*]. In this regard, she submitted that the Legal Practitioners Act permits the applicant to consider the conviction of a member for disciplinary purposes. In the alternative, she submitted that the requirement that one is a fit and proper person to practise as a legal practitioner entails that the person must disclose a criminal conviction. This is irrespective of whether or not one has noted an appeal against such conviction. Honesty and reliability are an integral part of being a fit and proper person to practise law. Regarding the issue of setting down of the appeal, Ms *Chagadama* submitted that communication from the Registrar's office did not reach the applicant.

I now proceed to analyse the issues. When the criminal appeal was set down on 24 June 2015 the matter was not heard as the first appellant in the appeal (*Auxilia Mangwaira*) had not been served with the notice of set-down. Attendant to that was the issue of her legal representation. At some stage Nyamushaya, Kasuso and Rubaya legal practitioners represented the second respondent, but the legal firm must have subsequently been disbanded. As a result there was an attempt to serve the second respondent through the applicant's offices. The High Court directed the Registrar to enquire with the applicant whether there was a curator for Nyamushaya, Kasuso and Rubaya legal practitioners. In the alternative it was directed that it be established as to who was representing the second respondent. The criminal appeal was to be set down only after the Registrar had positive feedback on the first respondent's legal representation.

In compliance with the High Court directive, the Registrar wrote to the applicant on 20 July, 27 September and 26 October 2015. There does not appear to have been a response from the applicant. That is why Mr *Mpofu* submitted that the applicant has not complied with the High Court directive. Even though Ms *Chagadama* claimed that such communication was not received by the applicant, the letter of 20 July 2015 bears a Law Society stamp of the same date.

Despite the applicant's tardiness in respect of the handling of the criminal appeal, I do not see how that matter affects the disciplinary proceedings. The two are separate processes that should not affect the other. This will be apparent from the disposal of the other point *in limine*, whether or not s 31 of the Civil Evidence Act is applicable to disciplinary proceedings involving legal practitioners.

Section 31 of the Civil Evidence Act provides that-

“(1) In this section—

“military court” has the meaning assigned to the term in section 2 of the Defence Act [Chapter 11:02].

(2) Subject to this section, where it is relevant in civil proceedings to prove that a person committed a criminal offence or did or omitted to do anything referred to in subsection (3), the fact that he has been convicted of that offence by any court in Zimbabwe or by a military court in Zimbabwe or elsewhere shall be admissible in evidence for the purpose of such proof.

(3) Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed unless the contrary is shown—

(a) that he did all acts necessary to constitute the offence; or

(b) where the offence is constituted by an omission to do anything, that he omitted to do that thing;

as the case may be.

(4) Evidence of a criminal conviction—

(a) shall not be adduced for the purposes of this section if the conviction is the subject of an appeal in terms of any law, until the appeal has been finally determined or has lapsed or been withdrawn or abandoned;

(b) may be adduced for the purposes of this section even if the convicted person has subsequently been pardoned.

(5) For the purposes of proving in civil proceedings that a person was convicted of a criminal offence, a document which—

(a) purports to be a copy of the record of the criminal proceedings concerned or a copy of any part of the record which shows that the person was convicted of the offence; and

(b) is proved to be a true copy of the original record or part thereof or purports to be signed and certified as a true copy by the official having custody of the original record;

shall be admissible on its production by any person as *prima facie* proof that the person concerned was convicted of that offence:

Provided that this subsection shall not preclude the admission of any other evidence to prove that the person committed the offence.”

In my respectful view disciplinary proceedings involving legal practitioners do not fall within the class of civil proceedings. They fall in a class of their own.¹ This is because the procedure in such cases is neither strictly criminal nor civil. The Legal Practitioners (Disciplinary Tribunal) Regulations, Statutory Instrument 580/81 provide that the chairman shall regulate the procedure.² Evidence may be adduced by way of affidavit³. It is only the degree of proof that may be similar to that applicable to civil or criminal proceedings, depending with the gravity of the complaint against a respondent.⁴

In *Siwanda Kennedy Mbuso Sibanda v The Law Society of Zimbabwe S.C.* 162-91 argument was advanced on behalf of the appellant that such proceedings were akin to

¹ *Solomon v Law Society of the Cape of Good Hope* 1934 A.D. 401

² S 11 (4)

³ S 11 (5)

⁴ *Pitluk v Law Society of Rhodesia* 1974 (2) RLR 245 (A); *Mugabe & Another v Law Society of Zimbabwe* 1994 (2) ZLR 356 (SC)

criminal proceedings. In rejecting that proposition MCNALLY JA at p.3 of the cyclostyled judgment had this to say-

“Certainly the Criminal Procedure and Evidence Act is not applicable, even by analogy, to the proceedings. They are governed by the provisions of the Legal Practitioners Act and Regulations (S.I. 580 of 1981) as amended by S.I. 695 of 1981). Section 11 (4) of the Regulations provides that the chairman of the Tribunal shall regulate the procedure at an inquiry.”

A distinction between disciplinary proceedings in general and disciplinary proceedings involving legal practitioners was also made in *Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (S). At 504 MCNALLY JA made the following observations-

“Reliance was placed upon cases involving the disciplining of lawyers before disciplinary tribunals such as *Mugabe & Mutezo v Law Society of Zimbabwe supra* at 365B-C; and *Pitluk v Law Society of Rhodesia* 1974 (2) RLR 245 (A). The fact that, in such proceedings, a higher standard of proof is required, does not lead to the conclusion that a higher standard of proof is required in all disciplinary proceedings.

There is a fundamental distinction. When the Law Society is disciplining one of its members, it is acting as a guardian of the public interest. It is not itself a directly interested party in the sense that an employer is. It is acting more like the State in a criminal trial, than like an employer in a civil dispute with its employee. Its interests do not need to be protected in the same way as those of an employer. There is no need to balance competing interests, as there is in a dispute between employee and employer.”

If there is any doubt about the nature of these proceedings one only has to look at the definition of civil proceedings in the Civil Evidence Act. Civil proceedings are defined as-

“civil proceedings” means proceedings which are not criminal in nature and which are before the Supreme Court, the High Court, a magistrates court or any other court to which the strict rules of evidence apply;”

As has already been noted from the Legal Practitioners (Disciplinary Tribunal) Regulations, it cannot be said that strict rules of evidence apply to its proceedings.

One other aspect to note is that the respondents do not dispute that they were convicted. It is contradictory for them to then contend that such evidence of their conviction should not be used against them during the disciplinary proceedings. This is analogous to an accused person claiming that a confession he or she is admitting should not be used against him or her.

The conviction of a registered legal practitioner under circumstances that may amount to unprofessional, dishonourable or unworthy conduct cannot escape scrutiny. It matters not

whether such conviction occurs when the legal practitioner is not practising law.⁵ That is why s 28 (3) of the Legal Practitioners Act provides that-

“Where a registered legal practitioner has been convicted within or outside Zimbabwe of an offence by a court of law and the Council of the Society or the Disciplinary Tribunal is of opinion that such offence constitutes unprofessional, dishonourable or unworthy conduct on the part of the legal practitioner, whether as a legal practitioner, notary public or conveyancer, the Council of the Society or the Disciplinary Tribunal, as the case may be, may, if it thinks fit, on proof before it of such conviction and without hearing further evidence, deal with the convicted person in accordance with this Act:

Provided that the convicted person shall be afforded an opportunity of tendering, in writing or in person or by his legal representative, as he may elect, an explanation to the Council of the Society or the Disciplinary Tribunal, as the case may be, in extenuation of his conduct.”

As can be noted from the above provision, that is the process that was initiated by Council of the Law Society. From the explanations tendered by the respondents, Council of the Law Society was not satisfied that the explanations did not warrant instituting disciplinary proceedings. In addition, s 23 (2) (b) of the Act authorises the Council of the Law Society, the Disciplinary Tribunal or a court to determine any conduct not specified in s 28 (1) or in by-laws as constituting unprofessional, dishonourable or unworthy conduct.

In light of the foregoing, the points *in limine* are hereby dismissed. The respondents are ordered to pay the applicant’s expenses.

Govere Law Chambers, 1st respondent’s legal practitioners

⁵ *Hassim (also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757; *Kwazulu-Natal Law Society v Singh* [2011] ZAKZPHC 12