IN THE SUPREME COURT OF ZAMBIA **SCZ No. 8/147/2012**

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

IN THE MATTER OF: **A Decision by the Acting Chief Justice then Hon. Lombe Chibesakunda (retired) dated 14th November, 2012 to review this matter upon two years thereafter**

AND

IN THE MATTER OF: **Section 33 of the Legal Practitioners Act Chapter 30 of the Laws of Zambia**

AND

IN THE MATTER OF: **An application by JU FRED LUNGU MATENDA for the Registrar to replace him on the Roll as a practitioner**

CORAM: **HON. CHIEF JUSTICE I. C. MAMBILIMA**
on the 17th August 2016 and 19th October 2016

For the Applicant: **Mr. E.B. MWANSA SC of EBM Chambers.**

For the Respondent: **Mr. A. J. SHONGA SC and Ms. S. NAMUSAMBA of Shamwana and Company.**

RULING

CASES REFERRED TO-

1. **GEORGE MALACHI MABUYE V COUNCIL OF LEGAL EDUCATION (1985) ZR 10**
2. **MBAALALA BERNARD MUNUNGU V THE LEGAL PRACTITIONERS ACT (1990-1992) ZR 159**
3. **BOLTON V LAW SOCIETY [1994] 2 All ER 486**

LEGISLATION REFERRED TO-

1. **THE LEGAL PRACTITIONERS ACT, CHAPTER 30 OF THE LAWS OF ZAMBIA.**
2. **NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, CHAPTER 96 OF THE LAWS OF ZAMBIA.**
3. **PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA**

This application comes before me by way of originating summons. The Applicant in this matter, is seeking to invoke powers vested in me to review his application to have his name restored on the Roll of legal practitioners. This has been done pursuant to Section 33 of the **LEGAL PRACTITIONERS ACT**[1], (hereinafter referred to as **"the Act"**). It provides that-

> **"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."**

To put this application to review in its proper context, some background is necessary. The Applicant, previously, issued a notice of motion to the Chief Justice on 25th April, 2012 to restore his name on the Roll of legal practitioners. The then Acting Chief

Justice, who dealt with the matter, declined to grant the application, on grounds that the Applicant had been convicted of a grave criminal offence, having been found with 19.3kg of marijuana at his house. She, nonetheless, held that the application should be reviewed within two years ***"to see if discretion can be exercised"*** and, hence this application before me.

The facts of the case are brief and substantially not in contention. The Applicant, an advocate of nine years' standing at the Bar was arrested and charged for trafficking in prohibited substances, contrary to Section 6 of **NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT**[2]. He pleaded guilty to the charge and was convicted but was granted a conditional discharge provided that he did not commit any offence within a period of two years.

Upon his conviction, the Disciplinary Committee of the Law Association of Zambia (hereinafter referred to as **"LAZ"**) recommended that the Applicant should be struck off the Roll because the offence he committed was of such serious and disgraceful character that he was unfit to remain a member of the honourable profession. A Divisional Bench of the High Court,

comprising two judges, accordingly, struck him off the Roll of Legal Practitioners. The Applicant's appeal to the Supreme Court was unsuccessful.

The Applicant's complaint to then Acting Chief Justice, was that he had been unfairly treated. His contention was that practitioners, like the late Mr. Edward SHAMWANA, Mr. Nsuka SAMBO and Stemon MSUNE, who had been convicted and sentenced for far more serious offences, had been allowed to practice after being pardoned or discharged. That in sharp contrast, the Disciplinary Committee refused to recommend his restoration despite being discharged and receiving recommendations from very senior counsel. That he was only permitted to work as a non-qualified person under Section 49 of the Act, relegating him to a position of a law clerk.

The Respondent strongly objected to the applications by the Applicant, arguing that granting the application as prayed, would not be in the interests of the profession. Further, that it would send a wrong signal to the public who held legal practitioners in very high esteem. Mr. SHONGA, SC on behalf of the Respondent, defended Law Association of Zambia (LAZ's) handling of the cases of

Mr. SHAMWANA, Mr. SAMBO and others, in that these legal practitioners were never removed from the Roll at the time of their incarceration and as such, did not have to apply for restoration after being pardoned or discharged.

Upon considering the evidence and the submissions before her, the Acting Chief Justice found as fact that the Applicant had been treated less humanely than similarly circumstanced advocates. She opined that-

> **"The Respondent had turned a *Nelsonian* eye to the gravity of the offences committed by other practitioners who were pardoned at different times by different Presidents by allowing them to remain on the Roll even when they were in custody incarcerated before they were pardoned. There has to be equality before the law. So I find force in the argument by Mr. MWANSA, SC, that if leniency has to be exercised, it has to be exercised on every Practitioner similarly circumstanced."**

However, the Acting Chief Justice held that, in this particular case, she could not exercise her discretion in favour of the Applicant because her hands were tied. She adjudged as follows-

> **"As I have already said, my hands are already tied, although I accept that the Respondent has not practiced the doctrine of equality before the law in as far as the Applicant is concerned especially when one looks at cases such as the Sambo case. However, the misconduct of the Applicant falls into the category of offences on which there has been public policy pronouncement. I cannot exercise my discretion in his favour. The application is rejected. However, this application should be reviewed in 2 years' time to see if discretion can be exercised".**

The Applicant, in his affidavit to support summons for review filed on 21st July, 2016, deposed that he is now 69 years old and has been out of practice for 18 years. He is seeking my indulgence because he is presently without any means of income as his employer, Chilupe and Permanent Chambers, has effectively declared him redundant after placing him on 12-months unpaid leave on 1st July, 2015. That apart from losing his wife in 2000, his son, a mentally-challenged epileptic who required constant nursing care, also died on 20th April, 2016 at the age of 19.

Counsel representing the Applicant, Mr. MWANSA submitted that the central issue was the Applicant's plea for mercy. According to him, the Applicant was now an old man who had traversed the deep waters of life and had realised the consequences of his misconduct. That the Applicant had suffered double jeopardy as he had been denied to practice and had served a conditional discharge for a period longer than the 12 months as prescribed by law. In conclusion, State Counsel submitted that this was a proper case for the Chief Justice to exercise discretion based on the principle laid down in the case of **GEORGE MALACHI MABUYE V COUNCIL OF LEGAL EDUCATION**[1]. In that case NGULUBE Acting CJ, as he then

was, stated that the nature and quality of misconduct, any evidence of subsequent good conduct could become relevant when considering a legal practitioner's fitness to practice.

He echoed the written submissions during the hearing of the application. This is primarily that the Applicant deserved to be given a second chance in view of his remorsefulness and changed circumstances. Mr. MWANSA prayed that I should exercise my discretion in line with the country's declaration as a Christian nation as enshrined in the preamble to the Constitution of Zambia.

Mr. SHONGA, in response to the arguments advanced by the Applicant, submitted, orally, that this application should not be entertained because there was no recommendation from the Disciplinary Committee to support the Applicant's request to be restored. That though Section 33 provided that, ***"The Chief Justice may, if he thinks fit, either on his own initiative or on the recommendation of the Disciplinary Committee...order the Registrar to replace on the Roll the name of a Practitioner...,"*** the ordinary use of the words ***"his own initiative"*** in that provision denotes that the Court must have taken a first step or originated the application but that was not the case here.

Mr. SHONGA contended, further, that when the Acting Chief Justice ordered a ***"review of the application"*** in two years time, it denoted an examination of the application based on new or changed circumstances. That in contrast, this application did not reveal any changed circumstances but was a mere reproduction of documents filed in the earlier application, save for the fresh letters of recommendation. That curiously, these letters from senior counsel were addressed to the Disciplinary Committee which to date had not seen it fit to recommend to the Chief Justice to restore the Applicant.

The learned State Counsel submitted that what was at stake here was the preservation of the integrity of the law profession. He, too, referred us to a portion of the Judgment in the case of **GEORGE MALACHI MABUYE V COUNIL OF LEGAL EDUCATION**[1], where it was held that-

> **"The overriding criterion for fitness to practice is integrity and for 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."**

Mr. SHONGA submitted that although the subject matter may have been different, the overall view the Supreme Court took in that case was that integrity played centre stage in the legal profession. That given the background associated with drug trafficking, no amount of repentance and subsequent good conduct could repair or redeem the Applicant's integrity. That in the circumstances, the declaration of a Christian nation in the preamble of the amended Constitution, was not helpful to the Applicant's case at all. He prayed that the application to review be dismissed.

Mr. MWANSA, in reply to Mr SHONGA's argument on preserving integrity stated that LAZ was applying double standards by punishing the Applicant forever.

I have given anxious consideration to the application for review, the submissions of Counsel and the decision from which this application emanates. In my view, the issue that falls to be decided is whether there are compelling reasons to exercise discretionary power to order the Registrar to replace the Applicant's name on the Roll of legal practitioners. In short, what has changed in the Applicant's circumstances during the intervening period to warrant a review of his status?

Mr. MWANSA argued spiritedly that the Applicant deserves mercy on account of age and his personal circumstances, as well as his remorsefulness and good conduct. Mr. SHONGA, on the other hand, submitted that given the gravity of the offence of drug trafficking, no amount of contrition and subsequent good conduct could repair or redeem the Applicant's integrity. That what was at stake was the preservation of the integrity of the legal profession.

As to whether this matter is properly before me in view of the provisions of Section 33 of the Act, I agree with the sentiments of the Acting Chief Justice in her decision. This is that by implication, it is open to an interested party to prompt the Chief Justice to initiate that process. As such, the argument advanced by Mr SHONGA urging me not to entertain this application in that respect is not tenable.

The core issue, in this case is whether the Applicant's circumstances have changed to warrant a review of the decision given by the Acting Chief Justice on 14th November, 2012. It is common cause that drug-related offences invariably attract heavy and punitive sanctions due to the devastating effects of the vice on society. Under Section 6 of the **NARCOTIC DRUGS AND**

in the intervening period. He has sought solace from the same case of **GEORGE MALACHI MABUYE**[1] where the Supreme Court held-

> ""**The overriding criterion for fitness to practice is integrity and for 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 misconduct and any evidence of subsequent good conduct become relevant."***

My comment is this. While it is true that evidence of subsequent good conduct may become relevant in certain circumstances, it is not in all cases that it can redeem an errant practitioner. In this particular case, the Applicant's predicament is exacerbated by the grave nature of the offence. It is not bailable and its penalties have been stiffened to include forfeiture of property. That being the case, it does not matter, that the Applicant has been treated differently from other legal practitioners. Also, there was evidence from the Respondent, which was not challenged, that the other practitioners were never removed from the Roll, and therefore there was no requirement for them to apply for restoration. In the circumstances, they cannot be said to have been similarly circumstanced.

I equally hold the view that issues relating to the Applicant's conditional discharge by the Court are not for my determination. These are matters that the Applicant or Counsel ought to have addressed on appeal against sentence and conviction.

Based on the authority of the case of **GEORGE MALACHI MABUYE**[1], it is clear that the overriding consideration for determining a legal practitioner's fitness to practice is integrity. Integrity answers to the question of how the public views the overall legal profession. Therefore, in dealing with cases of professional misconduct we have to constantly ask the question, what message are we sending to the public? Are we saying that a legal practitioner who misconducts himself can easily get away with it? On the contrary, we have a duty as to uphold the integrity of the profession. In doing so, I echo the words of NGULUBE CJ, in the case of **MBAALALA B MUNUNGU V THE LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE**[2] that-

> **"The difficulty in this case is to determine whether 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 ample supply of lawyers who have not fallen from grace."**

Furthermore, the attitude of Courts in this jurisdiction and elsewhere, in relation to professional misconduct of legal practitioners, has always been to be very slow to exercise the discretion to reprieve; and to exercise it only in the rarest of the circumstances. Extreme caution must be exercised by the Court, especially, where the law society to which the practitioner belongs has not seen it fit to recommend restoration, as is the case here. I find solace for this proposition in the words of Lord GODDARD CJ in Re a Solicitor ([1956] 3 All ER 516 at 517 cited in **BOLTON V LAW SOCIETY**[3] when he stated:-

> **"It would require a very strong case to interfere with sentence in such a case, because the Disciplinary Committee are the best possible people for weighing the seriousness of the professional misconduct."**

And I do not think that a change in the personal circumstances of a practitioner is reason enough to reverse the decision to strike off a legal practitioner who has been found guilty of professional misconduct from the Roll.

Much as I sympathise with the Applicant on the difficulties that he finds himself in, as Courts, we have a duty to protect the integrity of the profession. Legal practitioners equally have a duty

to uphold the ethics and integrity of the legal profession at all times. Any short coming will be visited by strong sanctions.

From the foregoing, I have found no compelling reason to depart from the decision of the Acting Chief Justice to reject the application to restore the Applicant on the Roll of legal practitioners. The Application to review is dismissed. Each party will bear their own costs.

DATED THIS ....19th.... day of ....October.... 2016

I.C. Mambilima
CHIEF JUSTICE