THE LAW SOCIETY OF ZIMBABWE
versus
SIFISO MUGADZA

LEGAL PRACTITIONERS' DISCIPLINARY TRIBUNAL
BEFORE: MANGOTA J (Chairperson), MUREMBA J (Deputy Chairperson) MR D KANOKANGA & MRS S MOYO (Members)
HARARE, 10 October 2022 & 12 April, 2023

N Chikowore, for the applicant
T Magwaliba, for the respondent

MANGOTA J: The respondent was registered as a legal practitioner in March 1995. He practiced for two years before joining Tedco Industries from January 1997 to December 2003. Thereafter he, in January 2004, returned to private practice and has been practicing law since then. He practices under the style Madanhi, Mugadza & Company Attorneys At Law.

The applicant filed the present application seeking an order for the deregistration of the respondent as a Legal Practitioner, Notary Public and Conveyancer. It moved us to direct the respondent to pay the applicant's expenses incurred in connection with these proceedings.

The applicant alleges that the respondent is guilty of dishonorable, unprofessional and unworthy conduct as defined in s 23(1)(c) as read with s 11(4) of the Legal Practitioners Act [*Chapter 27:07*]. This prohibits a registered legal practitioner from making over, sharing or dividing his professional fees with any person other than a registered legal practitioner practicing as such in that:

1. The respondent's law firm was on a panel of Law Firms for Commercial Bank of Zimbabwe Limited ('the complainant") and its associated companies. The respondent, by virtue of being on that panel, would be allocated debt collection and conveyancing work by the complainant.
2. Between July 2016 and October 2018, and on diverse dates, the respondent, with a view to inducing continued allocation of lucrative work, illicitly paid to Mr Noah Munaki (Mr Munaki) who was complainant's employee in charge of recoveries, 15-20% of his earned fees. These payments were kickbacks for work allocated. During that period, a total of 35 payments, amounting to US$ 34 698.00 were made by the respondent to Mr Munaki.

3. The matter came to light after the complainant carried out investigations following an anonymous tip off.

The facts giving rise to the complaint are that around 2018, the complainant received an anonymous tip off of underhand activity involving its head of recoveries and collections, Mr Munaki and several of the law firms on its panel of legal services providers. The respondent's firm was one of the firms involved.

Acting on the tip off, the complainant carried out investigations which revealed that between July 2016 and October 2018 the respondent entered into an illicit arrangement with Mr Munaki in terms of which Mr Munaki would allocate the respondent's firm lucrative legal work. In return, the respondent would share with Mr Munaki 15-20% of the fees that would have been earned from the work. Payments would be made from the respondent's firm's trust account, business account and/ or the respondent's personal account to a CBZ account in the name of Coderius Matore, Mr Munaki's wife. Between July 2016 and October 2018, the respondent had in terms of the aforesaid arrangement, on thirty-five occasions, transferred US$ 34 698 into Coderius Matore's account for Mr Munaki's benefit. As part of its investigations, the complainant interviewed the respondent who, on 12 October 2018, addressed a letter to the complainant admitting that he had the aforesaid illicit arrangement with Mr Munaki and that payments were made to Coderius Matore's bank account for Mr Munaki's benefit. The respondent also deposed to an affidavit in which he incorporated the contents of his letter of 12 October 2018.

In response to the application, the respondent filed a statement in which he pleaded guilty to the charge. The statement consists of eleven pages. Of these pages, ten are devoted to mitigation.

After considering the respondent's statement, the applicant climbed down. Instead of persisting with its application for the respondent's deregistration, the applicant amended its draft order to now seek the respondent's suspension from practicing as a Legal Practitioner, Notary Public and Conveyancer for a period of three years and an order for him to pay the applicant's expenses incurred in connection with these proceedings.

At the hearing, the respondent pleaded guilty. The tribunal accordingly found him guilty of unprofessional, dishonourable and/ or unworthy conduct.

MITIGATION

As already stated, the respondent filed written submissions in mitigation. These consisted of ten pages. The submissions were extensive and comprehensive. These were supplemented by oral submissions made at the hearing. The respondent submitted that he is a first offender and that first offenders should not be treated like repeat and/or hard-core offenders. He submitted that, save for some misdemeanor in 2008 for which he was fined by the applicant, he has had a clean record of practice. He has been candid and forthright. There has been a great deal of contrition and penitence on his part. He asserted that the offence arose out of fear and a lack of courage to report Mr Munaki. He feared that any action he might take could lead to the loss of his contract with the complainant. He did not initiate the offence. He was put under duress. He was an unwilling participant. His moral blameworthiness, he submitted, is not that high. His was a serious error of judgment. He said he lost money as he was prevailed upon to share his fees with a person who would not have done any work. There was no financial prejudice to the complainant. He is 51 years old and hypertensive. He is a family man. He has fallen from grace and has already suffered enough punishment in that he had to face the embarrassment of telling his children about this matter. He submitted that he had to go for a confession to his Parish Priest to tell him the challenges that he was facing with Mr Munaki. This shows that his conscience has always been eating him as he knew that what he was doing was not in accordance with the letter and spirit of the code of ethics for lawyers. He stated that he is facing and will always be facing embarrassment in the eyes of his LLB class of 1991 to 1994 as some members of his class were in the applicant's Council and Secretariat. They are alive to this case and look at him with condescending eyes. Like any other lawyer, the respondent had hoped that one day he can apply for appointment as a Judge. This single incident has almost ruined such hopes. The respondent is the sole principal in his firm. His practice structure denied him the benefit of guidance by experienced colleagues. In this regard, he urged the tribunal to take a cue from the Sammerley case where the appellant had never benefitted from the guidance of more experienced colleagues was always struggling and was unable to employ knowledgeable assistance[1]

Mr Magwaliba who appeared for the respondent during the hearing submitted that the sentence to be imposed on the respondent should not be punitive but reformatory. He submitted on the respondent's behalf that applications for the suspension or removal from the roll require

[1] Summerley v Law Society ,Northern Provinces 2006(5)SA 613

a three-stage enquiry. First, the tribunal must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is 'in the discretion of the tribunal' not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the tribunal must inquire whether, in all the circumstances, the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice [2]

He submitted, on respondent's behalf, that the first enquiry referred to *supra* was unnecessary as the respondent had pleaded guilty. As regards the second enquiry, he submitted that this was an unusual case in which the respondent had not abused trust funds but was a victim of extortion and that the respondent is still a fit and proper person to continue practice. As regards the third enquiry, he submitted that suspending the respondent from practice would lead to the firm's closure. This would adversely affect the five people who are employed by the firm. Suspending the respondent from practice would be unduly harsh. He submitted that, instead of suspending the respondent and placing his firm under curatorship, the respondent should be allowed to continue practicing but under a supervisor. The respondent moved the tribunal to impose on a him a wholly suspended sentence coupled with a fine.

AGGRAVATION

The applicant conceded that when the complainant conducted its own investigations, and before a complaint had been lodged with the applicant, the respondent deposed to an affidavit confessing his wrong doing. He fully co-operated in the investigations. Even after the applicant was seized with the complaint, the respondent maintained his candidness and admitted to conducting himself dishonourably. It was its view that the admission of guilt was a sign that the respondent is contrite.

Mr *Chikowore*, for the applicant, submitted in aggravation that the respondent voluntarily participated in the illicit arrangement as he stood to benefit from it in that he would get lucrative legal work from the complainant. The case involves dishonesty. The respondent was paying Mr Munaki 15-20% of his fees as kickbacks. He, between July 2016 and October

[2] Law Society of Northern Provinces vMogami and 2 others 2010 (1) SA 186 at para 4

2018 and on thirty-five (35) occasions, made payments to Coderius Matore totalling US $ 34 698 for Mr Munaki's benefit. His conduct was corrupt. He submitted that the respondent had ample time to reflect on his conduct. The respondent's moral blameworthiness is high. A lawyer must avoid all conduct which, if known, could damage his or her reputation as an honourable lawyer and honourable citizen[3]. If personal integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be[4] For these reasons, the applicant submitted that a suspended sentence would not be an appropriate sentence.

The applicant submitted that an order suspending the respondent from practice for three years is an appropriate sentence. Suspension from practice will achieve three things. First, it will punish the respondent. Second, it will serve as a deterrence to other legal practitioners, and lastly it will uphold the standards of professionalism within the profession. The applicant urged the tribunal not to attach too much weight to the respondent's submissions that he is a first offender, family man and of advanced age as these proceedings are neither criminal nor civil. They are disciplinary in nature. They are sui generis[5]. It was further submitted that the earning capacity of the respondent's employees is likely to remain unaffected if the respondent is placed under curatorship during the period of his suspension. Curatorship would see the practice continue as a going concern.

It was contended on applicant's behalf that the Summerley case relied on by the respondent is distinguishable from the present case in that the transgressions of the concerned lawyer related to maladministration of trust funds in circumstances in which the court specifically noted that a finding of dishonesty was not warranted. In the present case a finding of dishonesty is warranted. The guidance and lack of experience that was under discussion in the Summerley case related to the failure to keep proper books of accounts. It was not a question of integrity. In any event, the Summerley case ordered the suspension from practice of the concerned lawyer. That case does not assist the respondent.

The applicant further submitted that the respondent was guilty of serious misconduct involving corruption and underhandedness. The conduct reflects on his character and integrity. The respondent's moral blameworthiness is high. Were it not for his admission of guilty and co-

[3] Mr E.A L Lewis-Legal Ethics(1982)(Juta & Co) page 8
[4] Guiding Principle No 1 in Chapter 1 of the Canadian Bar Association's Code of Conduct
[5] Law Society of Zimbabwe v Kamdefwere HH 271-21

operation throughout the investigations, the applicant would have motivated for his deregistration. An appropriate sentence, so submitted the applicant, was an order suspending the respondent for a period of three (3) years from practicing as a Legal Practitioner, Notary Public and or Conveyancer. It was further submitted that the respondent's firm may be put under curatorship during the period of his suspension to ensure that the firm continues as a going concern.

SENTENCE

In its amended draft order, the applicant seeks the respondent's suspension for a period of three (3) years from practicing as a Legal Practitioner, Notary Public and Conveyancer as well as an order that the respondent pay the applicant's expenses incurred in connection with these proceedings. The respondent on the other hand contends that the Tribunal should impose a wholly suspended sentence coupled with a fine.

The question before the tribunal is the appropriate sentence to be imposed on the respondent. In arriving at an appropriate sentence, the Tribunal must consider, inter alia, the following sentencing objectives:[6]

(a) upholding public confidence in the administration of justice;
(b) safeguarding the collective interest in upholding the standard of the legal profession;
(c) punishment of the errant legal practitioner for the misconduct- and
(d) setting standards to be observed by other practitioners and in the process deterrence against similar offences by like-minded legal practitioners.

In applications of this nature, the views of the applicant, which is the regulator of the profession, should be given due consideration in arriving at an appropriate sentence. Where the regulator is of the opinion that the particular offender is no longer suitable as a member thereof and should be prevented from practicing the profession concerned, serious consideration should be given to its opinion[7].

As earlier stated, the applicant seeks the respondent's suspension from practice. Applications for the suspension or removal from the roll require a three-stage enquiry. First,

[6] Law Society of Singapore v Chiong Chin May Selena [2005] 4 SLR(R) 320 at 26
[7] Law Society of Zimbabwe v Sheelagh Cathrine Stewart HCH 39-89

the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is 'in the discretion of the Court' not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. Third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice[8]

In this case, the respondent pleaded guilty to the charge. This makes the first enquiry referred to *supra* unnecessary. The second question is whether, in the light of the misconduct thus established, the attorney concerned is not a 'fit and proper person to continue to practise as an attorney'. This issue requires an exercise of its discretion by the Tribunal. The exercise of this discretion involves a weighing up of the conduct complained of against the conduct expected of an attorney.

It must be borne in mind that the profession of an attorney, as of any other officer of the court, is an honourable profession which demands complete honesty, reliability and integrity from its members and it is the duty of the law society to ensure, as far as it is able, that its members measure up to the high standards demanded of them [9] .

In this case, the respondent did not only share his fees with a person who is not a registered legal practitioner contrary to the provisions of s 11(4) of the Legal Practitioners Act [*Chapter 27:07*]. He entered into an illicit arrangement with Mr Munaki to ensure that he received lucrative legal work from the complainant. This involved an elaborate scheme in which payments would be deposited from the respondent's trust account, business account and/ or personal account into Coderius Matore's bank account for Mr Munaki's benefit. This way, the respondent ensured that he had an unfair advantage over other law firms which were on the complainant's panel of legal service providers.

The payments in question were not made once. They were made on thirty-five (35) occasions. This happened between July 2016 and October 2018.The total amount paid to Coderius Matore for Mr Munaki's benefit was US$34 698.

We do not accept the respondent's submission that he entered into the illicit arrangement out of fear and that he was an unwilling participant. The respondent was a willing

[8] Law Society of Northern Provinces v Mogami 2010(1) SA 186 at para 4
[9] Vassen v Law Society of Good Hope 1998 (4) 532 (SCA) at [14]:

participant as he stood to benefit from the illicit arrangement. He had nothing to fear as he could have anonymously reported Mr Munaki to the complainant. He knew that what he was doing was unethical. He had ample time to reflect on his conduct. He lacked integrity which is a fundamental quality of any person who seeks to practice as a member of the legal profession.

In its letter of complaint of 18 December 2018 to the applicant, the complainant stated that," Our investigations have shown that the law firms were involved in corruption and bribery activities involving a senior employee of CBZ Bank Limited Mr Noah Munaki". We agree with the complainant's characterization of the respondent's conduct as criminal. The image and standing of the profession are judged by the conduct and reputation of all its members. The respondent cannot claim lack of experience and guidance as he knew what he was doing when he entered into the illicit arrangement with Mr Munaki. He is a senior member of the profession having practiced law for more than twenty years. We view the respondent's unwholesome conduct as being very serious. It undermines public confidence in the profession. His moral blameworthiness is very high.

The question which begs the answer is whether or not the respondent is a fit and proper person to continue practicing law.It is commonly accepted that, in order to be "fit and proper", a person must show integrity, reliability and honesty, as these are the characteristics which could affect the relationship between a lawyer and a client or a lawyer and the public.[10]In our view, the respondent is not a fit and proper person to continue practicing law because of his lack of integrity.

The third enquiry relates to whether the respondent should be removed from the roll of attorneys or whether an order of suspension from practice would suffice. The applicant is not seeking the respondent's removal from the roll of attorneys. It is seeking his suspension for a period of three (3) years from practicing as a Legal Practitioner, Notary Public or Conveyencer. The Tribunal is guided by the opinion of the applicant as the regulator of the profession.

It has already been observed that the respondent devoted ten pages of his mitigation to moving the tribunal not to place his neck under the guillotine, so to speak. He persuaded the tribunal not to delete his name from the register of practicing lawyers. He moved us to impose upon him any penalty which was/is divorced from deregistration. So strong was his mitigation

[10] Magda Slabbert-Potchefstrom Electronic Law Journal Per Vol 14 n4 Potchefstrom July 2011

that the applicant had to climb down to amend the penalty which it moved us to impose upon the respondent from deregistration to suspension from practice.

It is, accordingly, difficult to understand the position of the respondent as submitted by counsel for him. He moves that a fine and a suspension from practice would meet the justice of the case. We disagree. Our disagreement centers on the simple fact that no court nor tribunal will brook corruption. Corruption is a scourge which must be uprooted from amidst us all. It is a cancer which should not be allowed to rear its ugly head within the Zimbabwean society. If its head is allowed to remain, it will destroy people's lives in a very devastating manner.

The respondent's conduct, it has already been established, smacks of nothing but utter corruption. No person will condone, let alone accept, it. It should be nipped in the bud. This is a fortiori the case where, as in casu, the life and work of a legal practitioner, of whom the respondent is one, thrive on the qualities of honest, integrity and/or good moral standing, among others.

After carefully weighing the mitigating, against the aggravating, factors of the case, it is our view that the aggravating factors outweigh the mitigating factors. The Summerley case cited by the respondent is distinguishable from this case as same related to the concerned attorney's failure to keep proper books of accounts. It did not involve the corrupt payment of kickbacks by an attorney to an employee of his client. In any event the court in that matter ordered the suspension from practice of the concerned lawyer. The Summerley case does not assist the respondent.

A wholly suspended sentence as sought by the respondent would not meet the justice of this case. It would not punish the respondent. It would not deter similar minded Legal Practitioners. Nor would it safeguard the collective interest in upholding the standard of the legal profession. Such a sentence would trivialize the offence.

In *The Law Society of the Cape of Good Hope v Berrange*[11] the court had to consider the issue of "marketing agreements" between attorneys and estate agents. Certain estate agencies referred conveyancing work to Berrange's firm and got payments in excess of R500 000 for the favour. The payments were purportedly made for the promotion and marketing of the respondent's firm. That, according to the judge, clearly constituted "soliciting" of professional work within the meaning of Rule 14.6.1.1.[12] Once again a rule was broken, which automatically

[11] 2005(5) SA 160(c)
[12] Rule 14.6.1.1 of the Rules of the Cape Law Society,which addresses the sharing of fees

led to declaring the person who broke the rule to be not "fit and proper". The respondent was therefore guilty of unprofessional conduct akin to touting. The attorney was suspended from practice for a period of two years.

The respondent submitted that an order of suspension as sought by the applicant would result in the closure of his firm and that this would result in his five employees losing their means of livelihood. In response, the applicant submitted that the respondent's firm could be placed under curatorship to ensure that it continues as a going concern. Given his age, the respondent can, upon the lapse of his suspension, still resume the practice of law. It is our view that it would be in the interests of the respondent and his employees for the respondent's firm to continue as a going concern. This is best achieved by placing the firm under curatorship.

In the result, we order as follows:

1. The respondent is suspended from practicing as a Legal Practitioner, Notary Public and Conveyancer for a period of three (3) years.
2. The respondent's firm be and is hereby placed under Curatorship to administer its trust accounts and/ or business accounts.
3. The respondent pays the Applicant's expenses incurred in connection with these proceedings

CHAIRPERSON