

THE LAW SOCIETY OF ZIMBABWE
versus
KUDZAI MUKANHAIRI

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
CHATUKUTA J (CHAIRPERSON), MUSAKWA J (DEPUTY CHAIRPERSON)
S. MOYO AND D. KANOKANGA (MEMBERS)
HARARE, 18 January 2019 & 16 June 2021 & 9 July 2021

Disciplinary hearing

S. Gahadzikwa, for the applicant
Respondent in default

MUSAKWA J: The applicant applied for an order for the deletion of the respondent's name from the register of legal practitioners, notaries public and conveyancers. The applicant also sought an order for the respondent to pay expenses incurred in connection with the proceedings.

The respondent was registered to practice law in 2011. It is alleged that the respondent clandestinely gave unsolicited legal advice to Foly Cornishe (Pvt) Ltd, a client of Linda Chipato Legal Practitioners. The respondent further authored correspondence in which she used intemperate and unmeasured language against a fellow legal practitioner, Linda Chipato.

The complaint against the respondent came from Foly Cornishe (Pvt) Ltd itself and is summarised as follows: Foly Cornishe (Pvt) Ltd is a registered company and owns stand number 2558 Glen Lorne Township measuring 18.2024 hectares. The property was the subject of litigation dating back to 2008 wherein Foly Cornishe (Pvt) Ltd was represented by Linda Chipato Legal Practitioners. Shingirayi Tapomwa fraudulently transferred the property to the estate of his late father Misheck Tapomwa. In transferring the property to the estate of his late father, Shingirayi Tapomwa had claimed that the property was pledged to his late father. An application for reversal of the transfer was dismissed by the High Court. However, on appeal to the Supreme Court the High Court decision was set aside.

On 4 February 2015 the respondent contacted a representative of Foly Cornishe (Pvt) Ltd through a telephone call as well as WhatsApp chats in connection with the property. The respondent cautioned against disclosing the communication to Ms Chipato. The representatives of Foly Cornishe (Pvt) Ltd were not aware that the respondent had left the employment of Linda Chipato Legal Practitioners. The representatives were aware that the respondent had

previously attended the Supreme Court on 28 March 2014 to note judgment involving Foly Cornishe (Pvt) Ltd in the absence of Ms Chipato. The respondent had also prepared a court application where Foly Cornishe (Pvt) Ltd had sought the eviction of Shingirayi Tapomwa from the property.

In 2015 there were attempts to acquire the property in terms of the Land Acquisition Act [*Chapter 20:10*]. On 4 February 2015 the respondent wrote the following email to Sandy Humphreys of Foly Cornishe (Pvt) Ltd:

“Hi Sandy. I hope this finds you well despite all the trauma of the acquisition.

As you requested telephonically, I lay hereunder my client’s proposal for your consideration.

1. My client proposes that he works towards the reversal of the land acquisition as he once did with the land that belonged to Clouds End Stud (Pvt) Ltd a company wholly owned by Robin David Nursten and Renee Nursten which was gazetted in 2010. The way he will do it is through the following

a) We draft an agreement between yourselves and him in terms of which we stipulate how you will work in the event of the reversal of the land acquisition. My client is proposing that once the land acquisition is reversed, the property will have to be subdivided and the stands be sold. He proposes that 10% of the stands would go towards endowment to council, 10% would go towards development of the land. This means you will not fork out any money towards the development of the land. You will then get 40% of the stands and he gets 40% as well. As soon as there is a permit to subdivide and survey diagram, the exact stand numbers each party is going to benefit will be stipulated and each party will sell its own stands for its own benefit whilst the development will be catered for by the 10% reserved for that.

b) Land acquisition in Zimbabwe is only against whites so we will draft an agreement between yourselves and him selling to him the shares in the company Folly Cornishee. This is the only agreement he will get, you will not give him title deeds and you will not transfer the land, that will be your security. This agreement which will be dated back to last year he will go with to the Minister of Lands, T Mombeshora and advise that the land the Minister gazetted belongs to him. There is no law allowing land acquisition of black owned farms, so the reversal is definite. Just because we propose to back date the agreement, we therefore advise that Linda should not lodge an appeal which everyone knows will not be successful in any event. The Minister will then ask why you lodged an appeal if the land belonged to our client. That will be the end of the story.

c) After signing the above mentioned two agreement (sic) you may or may not depending on the pressure from the Ministry have to change the CR14 and CR6 of Folly Cornishee.

Send my greetings to John

Regards

Kudzai

Mukanhairi-Mkaodza Attorneys”

When the applicant sought the respondent's reasons, she replied in her letter dated 4th March 2015 that she had not acted in a professional capacity as there was no legal practitioner-client relationship between her and the complainant. She further stated that despite the complainant having won the appeal in the Supreme Court she then advised it to sell the property because of the politics involved. This was because the property would be compulsorily acquired. She further stated that on the other hand a Mrs Banda advised against selling the land.

In the same letter she stated the following with regard to Mrs Banda:

"I believed that her advice was honest until I learnt from her own mouth that God had given her the land so that she can build Calvary Harvest Ministries and help the poor there. Because of this motive, she cancelled the permit to subdivide land. I advised her that cancelling the permit to subdivide would expose the land to acquisition but she declined my advice because the permit was not needed to build the church. Mrs Banda is married to a Pastor in the UK and she is planning to move her husband to Zimbabwe in 2 years' time. God therefore gave her stand 2558 Glen Lorne to build the church. Unfortunately God did not tell the Folly Cornishees as yet. Because God has not yet told them they went ahead to put the land on sale through their estate agent of record, June Mustaff. Mrs Banda was not happy with this move and as a delaying tactic she advised the clients that she had an investor in UK willing to buy the land at US\$5 million. This was a lie from the pit of hell and by investor she meant her husband, Pastor Phillimon Banda knowing fully well he does not have the money.

The clients were victims of this lie and they stopped June Mustaff from selling this property. Time went on and she even drafted an agreement just to make them believe that there is indeed an investor in UK. There came a time when the lies could not be sustained and pressure was mounting on Mrs Banda about the investor. She then flew to the UK in October or November to see her husband and nothing came out of that flight. Lies went on and on. The victims were never suspecting and still are not aware of Mrs Banda's ill intentions about the land."

In her counter-statement the respondent denied acting unprofessionally. She contended that her conduct did not result in the complainant getting into conflict with its chosen legal practitioner. Her conduct was meant to safeguard the interests of the complainant whom she had known for a year and to whom everyone at the law firm (not specified) was emotionally attached. Thus she was motivated by good intentions. She also denied using intemperate language and claimed that what she wrote was the truth. She further claimed that her former employer was no longer serving the interests of the complainant.

As regards the order of deregistration, the respondent contended that this was excessive and unprecedented. Without citing any authority, she further contended that there are many such cases like the present where errant legal practitioners have been punished with orders for costs *de bonis propriis*. She also contended that it should be considered that she was still junior and could benefit from mentorship.

The conduct of the respondent is unprofessional in three respects. Firstly, bypassing a fellow legal practitioner and surreptitiously communicating with that legal practitioner's client

offends against the ethics of the profession. In this regard see B.D. Crozier- Legal Ethics. See also TP Gambe in A Guide To Ethics and Trust Account Management (2018) where at p 18 he writes:

“Unless the other party has consented thereto, it is improper to communicate directly with the client of another when fully aware that the client is represented.”

See also the case of *Mhene v Teubes* 1986 (2) ZLR 179 (SC).

In the present case, the respondent was aware that her conduct was unethical and that is why she cautioned the complainant’s representative not to disclose their communication to Ms Chipato. The respondent had previously worked as a professional assistant for Linda Chipato Legal Practitioners. She knew that the complainant was a client of Linda Chipato Legal Practitioners as she had once noted judgment concerning the complainant. She had also prepared a court application on behalf of the complainant. The respondent did not make issue of all these factors. That she did not contest these issues but simply chose to claim that she did so out of good intentions shows that she has a deficit on probity.

In bypassing a fellow legal practitioner, the respondent also committed another serious transgression. This is because she conspired to defeat the provisions of the Land Acquisition Act. Thus she breached her common law duty to uphold the law. The conduct in question amounts to attempting to defeat the course of justice.

The third aspect relates to the respondent’s discourteous conduct towards a fellow legal practitioner. A legal practitioner must be courteous to another legal practitioner. This finds expression in rule 4 of the International Bar Association: International Code of Ethics. See also T.P Gambe (*supra*) at p. 14 where he states that lawyers have a duty to be polite, respectable and courteous towards fellow legal practitioners. In her letter to the applicant the respondent out rightly called Ms Chipato a liar. She also used inappropriate language that suggested that Ms Chipato was unprofessional or incompetent. If the respondent had reason to believe that Ms Chipato was unprofessional, the best she could have done was to report to the applicant.

Disposition

Accordingly, the respondent is found guilty of unprofessional, dishonourable or unworthy conduct.

Sentence

For purposes of sentence the respondent was invited to file submissions in mitigation by 22 June 2021 and she did not do so. It will be assumed that she has elected not to do so.

Nonetheless account will be taken of the respondent's submissions regarding sentence when she filed her counter-statement. It will be noted that the respondent submitted that de-registration is unprecedented for such conduct. She submitted that legal practitioners in similar situations have been made to pay costs de *bonis propriis*.

In its submissions in aggravation, the applicant has sought that the respondent be de-registered. In seeking such penalty it was submitted that it is incumbent that the integrity and reputation of the legal profession be maintained. Reference was made to the cases of *Law Society, Transvaal, v Matthews* 1989 (4) SA 389 and *Chizikani v The Law Society of Zimbabwe* 1994 (1) ZLR 382. It was further submitted that whilst the Tribunal has discretion on penalty, the attitude of the applicant must be considered.

The applicant further submitted that each of the three acts of misconduct for which the respondent was found guilty are serious enough to warrant deregistration. Thus the cumulative acts of misconduct entail that the respondent is not a fit and proper person to remain on the roll of legal practitioners. It was further submitted that the respondent failed to attend the disciplinary hearing on 18th January 2019. Such conduct reflects badly on the respondent's attitude towards the proceedings.

The applicant also submitted that the delay in the finalisation of the matter is not mitigatory enough to tip the scales in the respondent's favour. Reference was made to the cases of *Tayengwa Dugmore Muskwe v Law Society of Zimbabwe* SC 72/20 and *Law Society of Zimbabwe v Muchandibaya* HH 114-17 in which the delay in finalisation of the matters did not affect deregistration of the respondents.

The respondent's submission that she be ordered to pay costs de bonis propriis as punishment is misplaced. In the first place this is not a matter about costs but misconduct. Section 28 (1) of the Legal Practitioners Act [*Chapter 27:07*] which provides for powers of the Tribunal following an inquiry makes no provision for imposition of costs as a penalty.

It should be observed that before an applicant is registered as a legal practitioner, he or she takes the oath of loyalty in terms of s 86 of the Legal Practitioners Act. The form of oath is prescribed in terms of the Third Schedule to the Constitution of Zimbabwe as follows:

"I swear [*or solemnly affirm*] that I will be faithful and bear true allegiance to Zimbabwe and observe the laws of Zimbabwe.
So help me God. [*To be omitted in affirmation*]"

A legal practitioner has a duty to uphold the law and not to undermine it. The duty entails furthering the interests of the administration of justice to the best of one's ability. On the contrary, the respondent sought to detract from that fundamental obligation. She did not

seem to be aware of this enormous responsibility. This reflects that she is a fit and proper person to continue practising law. This accords with the attitude of the applicant which we take into account. We take the view that the respondent's misconduct is of a gross nature that warrants deregistration.

Accordingly, it is ordered that:

1. The respondent's name be deleted from the register of legal practitioners, notaries and conveyancers.
2. Respondent shall pay the expenses incurred by the applicant in connection with the proceedings.

The law Society of Zimbabwe, applicant's legal practitioners